# SUPREME COURT OF THE UNITED STATES.

## No. 117.

CHARLES McMICKEN, PLAINTIFF IN ERROR,

vs.

AMOS WEBB ET AL.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR LOUISIANA.

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J. & G. S. Gideon, printers.

Be it remembered that, on the third day of January, one thousand eight hundred and thirty-five, the plaintiff, Charles McMicken, by his attorney, G. B. Duncan, esq., came into court and filed the following petition, to wit:

To the honorable Samuel Harper, judge of the district court of the United States, in and for the eastern district of the State of Louisiana:

The petition of Charles McMicken, a citizen and resident of the city of Cincinnati, in the county of Hamilton, and State of Ohio, without the jurisdiction of this honorable court, respectfully represents, that Amos Webb, a citizen and resident of the State of Louisiana, and now within the jurisdiction of this honorable court, to wit, in the Parish of New Orleans; and Mrs. Mary Ann Smith, in her own capacity, and also as tutrix, as hereinafter stated, and Ira Smith, in his own capacity, and also as tutor, as hereinafter stated, all of which said last named defendants are citizens and residents of the State of Louisiana, within the jurisdiction of this honorable court, to wit, in the parish of West Feliciana, are jointly and severally indebted to your petitioner in the sum of four thousand eight hundred and sixty-six dollars ninety-three and one-half cents, bonds, interest and costs, for this, to wit: that, some time in the year 1815, your petitioner, and one James H. Ficklin, formed a co-partnership, and did business in the parish of Feliciana, in the State of Louisiana, under the name and firm of McMicken & Ficklin; that, on or about the 8th day of September, 1817, said partnership was dissolved by the mutual consent of said partners; that, at the time of said dissolution, there was a quantity of stock of goods on hand, which said Ficklin took and purchased at costs, with five per cent. addition thereon; and for the payment of one-half of said stock of goods he executed to your petitioner a certain promissory note, in writing, dated on the twentieth day of September, 1817, and due and payable on the first day of March, 1819, to the order of McMicken and Ficklin, for the sum of four thousand eight hundred and sixty-six dollars ninety-three and one-half cents; executed and subscribed by said Ficklin, Jedediah Smith, (by the name of Jed. Smith,) and Amos Webb, the above-named defendant, whereby they, the said drawers, promised jointly and severally to pay the aforesaid sum of four thousand eight hundred and sixty-six dollars and ninety-three and one-half cents, with ten per cent. interest thereon, after due, until paid, as will more fully appear by inspection of said note, a copy of which is hereto annexed, and made part of this petition, whereby each of said drawers became bound to pay the whole amount of the said note.

Your petitioner further shews that said obligation, though erroneously made payable to McMicken & Ficklin, though in truth and in fact said note was dated and executed subsequent to the said dissolution of said

firm, and was made towards and in behalf and for the sole and individual benefit of your petitioner, the joint name, or the name of the late firm being used and intended for your petitioner's sole benefit—said Ficklin being in no wise a party or interested therein except as one of the obligors.

Your petitioner further shows, that since the execution of the said note or obligation, the above mentioned Jedediah Smith, one of the co-obligors thereof, died, leaving his wife, the said Mary Ann Smith, and two minor children, Catharine and Sarah, all of whom now own and possess all the property and estate by the said Jedediah Smith left at his decease.

The mother in right of her community, and said minors as heirs, and the said Mary Ann Smith, the widow of said deceased, has since married one Ira Smith, the said defendant herein, by reason of which said several premises, the said Mary Ann, Catharine and Sarah, have become obligated and bound, in solido, to pay your petitioner the whole amount of said note or obligation, together with interest, according to the tenor and effect thereof, which they refuse, though often and amicably demanded to pay.

And your petitioner avers, that he is a citizen, and resides as aforesaid in the city of Cincinnati, in the county of Hamilton, and State of Ohio; and that the said Mary Ann Smith, and her husband Ira Smith, and the said minors, Catharine and Sarah, are citizens of the State of Louisiana, and reside in the parish of West Feliciana within the jurisdiction of this honorable court, and that the said Mary Ann Smith is the natural tutrix, and the said Ira Smith the tutor, of said minors, and that the defendant Amos Webb is a citizen of the State of Louisiana, and now in this city of New Orleans, within the jurisdiction of this honorable court.

Your petitioner therefore prays, that said Mary Ann Smith, and her husband Ira Smith, may be cited to answer this petition in her own capacity, and as natural tutrix, and said Ira Smith as tutor, to said minor children, and that the said Amos Webb be cited to appear and answer this petition; and that they be decreed, jointly and severally, to pay said sum of four thousand eight hundred and sixty-six dollars ninety-three and one half cents, with ten per cent. interest thereon, according to the tenor, the true intent and meaning of said note, until paid, and that judgment be rendered against them as aforesaid, for said amount, with costs of suit in favor of your petitioner.

Your petitioner asks for all other orders, decrees, and judgments adapted to the nature of his case, and consistent with law and equity, and for general relief; and as in duty bound will ever pray, &c.

(Signed,) G. B. DUNCAN,
*Att'y for Petitioner.*

*Copy of the aforesaid note.*

$4,866 93½ St. Francisville, Sept. 20th, 1817.

On the first day of March, 1819, we or either of us promise to pay,

jointly or separately, unto McMicken and Ficklin, or order, four thousand eight hundred and sixty-six dollars ninety-three and one half cents, being for value received, with ten per cent. after due until paid.

JAMES H. FICKLIN,
JED. SMITH,
AMOS WEBB.

And on the same day the following citation was issued, to wit:

The President of the United States of America, to the marshal of the eastern district of Louisiana, or his lawful deputy, greeting:

You are hereby commanded to cite Amos Webb, so that he be and appear at the district court of the United States, for the eastern district of Louisiana, to be holden in the city of New Orleans, on the 3rd Monday in February, 1835, to answer to the complaint of C. McMicken, and that he do file his defence or answer with the clerk of said court, on or before the same, or judgment will be given against him by default; and have you then and there this writ.

Witness the honorable Samuel H. Harper, judge of the said court, at the city of New Orleans, this 3rd day of January, 1835, and 59th year of the independence of the United States.

(Signed,) DUNCAN N. HENNEN, *Clerk.*

*Marshal's return thereon.*

Received 3rd January, 1835, served a copy hereof, and copy of petition, on Amos Webb, personally, the same day, at ten minutes before 3 o'clock, P. M.

Returned.

(Signed,) JOHN NICHOLSON,
*U. S. Marshal.*

And afterwards, to wit, on the 19th day of January, 1835, the following citation was issued:

The President of the United States of America, to the marshal of the eastern district of Louisiana, or his lawful deputy, greeting:

You are hereby commanded to cite Mary Ann Smith, in her own capacity, and as natural tutrix of her minor children, and Ira Smith as tutor, so that they be and appear at the district court of the United States, for the eastern district of Louisiana, to be holden in the city of New Orleans, on the 3rd Monday of February, 1835, to answer to the complaint of Charles McMicken, and that they do file their defence, or answer, with the clerk of said court, on or before the same, or judgment will be given against them by default; and have you then and there this writ.

Witness the honorable Samuel H. Harper, judge of the said court, at the city of New Orleans, this 19th day of January, 1835, and 59th year of the independence of the United States.

(Signed,) JAMES N. LEA, *Deputy Clerk.*

Endorsed:—The within citation made at my request and under my directions, this 19th January, 1835.

(Signed,) C. McMICKEN.

*Marshal's return.*

Received 19th January, 1835, served copy of the within citation on Mary Ann Smith, personally, 21st inst., and made return into court same day.

(Signed,) E. COLFORD,
*U. S. Dep. Marshal.*

And on the same day the following citation was issued, to wit:

The President of the United States of America, to the marshal of the eastern district of Louisiana, or his lawful deputy, greeting:

You are hereby commanded to cite Mary Ann Smith, in her own capacity, and as natural tutrix to her minor children, and Ira Smith as tutor, so that they be and appear at the district court of the United States, for the eastern district of Louisiana, to be holden in the city of New Orleans, on the third Monday of February, 1835, to answer to the complaint of Charles McMicken, and that they do file their defence, or answer, with the clerk of said court, on or before the same, or judgment will be given against them by default; and have you then and there this writ.

Witness the honorable Samuel H. Harper, judge of the said court, at the city of New Orleans, this 19th day of January, 1835, and 59th year of the independence of the United States.

(Signed,) JAMES N. LEA,
*Deputy Clerk.*

Endorsed:—The within citation made at my request and under my directions, this 19th January, 1835.

(Signed,) C. McMICKEN.

*Marshal's return.*

Received 19th January, 1835, served 21st inst. a copy of the within citation on Ira Smith, personally, and made return into court same day.

Signed, E. COLFORD,
*U. S. Dep. Marshal.*

And afterwards, to wit, on the 16th of February, one thousand eight hundred and thirty-five, the following answer was filed:

To the honorable the judge of the court of the United States for the eastern district of Louisiana:

Amos Webb, and Ira Smith, and Mary Ann Smith, in her own right, and as tutrix of her minor children, who are jointly impleaded at the suit of Charles McMicken, come, and not waiving the pleas and exceptions to the jurisdiction, by them heretofore filed, but only de bene esse, and in case the same are overruled, to the petition of said Charles, filed in that behalf, except for that:

1st. The petition of said Charles does not set forth his cause of action fully and sufficiently, and does not set forth and allege any assignment to him by McMicken and Ficklin, the payees of the note described in his petition, or shew how, or in what manner, or for what reason, or any original contract or consideration, by reason whereof the said Charles is and ought to be alone entitled to the benefit of the note set forth and described in his petition, or to receive solely and individually the contents thereof; or any agreement or contract, by virtue whereof the said Amos and Jedediah Smith were bound to pay him the same. Wherefore, the said Amos, Ira and Mary Ann, pray the judgment of the court, whether they are bound to answer the said petition, and that the same be dismissed with costs.

2dly. The said Amos, Ira and Mary Ann, further secondly except to said petition, for this, that in said petition it is alleged that at the time of the dissolution of a certain alleged partnership, there was a quantity of stock of goods on hand, which James H. Ficklin took and purchased at cost, with five per cent. additional thereon, and for the payment of one half of said stock of goods he executed to said petitioner a certain promissory note, viz, the promissory note of which a copy is annexed to the petition. Now, so it is, the copy of said note annexed to said petition is not executed in favor of petitioner, but is executed to and in favor of McMicken and Ficklin. Wherefore, for the variance and contradiction between the allegations of the petition and the copy of the note annexed, and made part of petition, respondents pray judgment of the court whether they are bound to answer said petition.

3dly. These respondents further thirdly except, that in and by said petition it is alleged, that the original alleged contract, on which said note was given to McMicken and Ficklin, was a contract between Charles McMicken and James H. Ficklin; and the said Amos Webb and Jedediah Smith, if ever they signed said note, signed the same as sureties for said Ficklin, and not otherwise; and the said Charles McMicken in his petition, without alleging any assignment or transfer to him, asks and demands that the whole amount of said note be paid to him, under the pretence that the joint name, or the name of the then late firm of McMicken and Ficklin, was used and intended for the sole benefit of said Charles McMicken, said Ficklin being no more a party, or interested therein, except as one of the obligees, thereby varying, increasing, and seeking to render more burthensome the obligations of said Amos and Jedediah, sureties as aforesaid, without shewing any legal right so to do, or any legal obligation on the part of said Amos or Jedediah, to pay him, the said Charles, the whole amount of the contents of the said note. Wherefore, these respondents pray the judgment of the court, whether they are bound to answer the said petition, and that the same be dismissed with costs.

4th. These respondents admit that said Amos Webb and Jedediah Smith signed the note sued on, and that said Jedediah is deceased, and said Mary Ann is his widow, now married to Ira Smith, and said Catharine and Sarah are his children, and said Ira and Mary Ann are tutor

and tutrix of said minors; these respondents further answer and plead the exception of res judicata, for this, that the demand made and set up by the said Charles in his lifetime, and the whole subject matter in dispute between the parties, has been adjudged and passed upon by a court of competent jurisdiction, and judgment was rendered in favor of said Amos and Jedediah, and against the said Charles, for that the said Charles did heretofore assign and transfer the note mentioned and described in the petition, and all his right and interest therein, to Thomas Walker and Samuel P. Walker, carrying on business under the name of Thomas Walker & Co.; and the said Thomas Walker & Co., on or about 23d March, 1819, instituted a suit in the court of the third judicial district of the State of Louisiana, for the parish of Feliciana, against Jedediah Smith and Amos Webb, for the not performing the said identical promises and undertakings in the said petition mentioned, and to recover the amount of said note from them, jointly and severally; and such proceedings were thereupon had, that a verdict and judgment was thereupon given and rendered in favor of said Jedediah Smith and Amos Webb, and against said Thomas Walker & Co., which judgment was signed on the 4th May, 1821, and remains in full force and virtue, and not revoked or made void; all which matters will more fully and at large appear, by a copy of the record of said suit, which respondent annexes to this answer, and prays may be taken as part of the same, and which verdict and judgment respondents plead as res judicata of the matter and cause of action sued on by said Charles McMicken, as set forth in his petition. Whereupon respondent prays that it be so adjudged, and that plaintiff's petition be dismissed with costs. And these respondents further also plead said judgment in bar, and as estoppel against said McMicken, to recover on said note against them.

Signed, EUSTIS, *Att'y.*

And on the same day the following exceptions were filed, to wit:

To the honorable the judge of the district court of the United States, for the eastern district of the State of Louisiana:

Mary Ann Smith, in her own capacity, and as tutrix of her minor children, Catharine and Sarah Smith, and Ira Smith, tutor of said minors, who are impleaded, jointly with Amos Webb, at the suit of Charles McMicken, come and except to the petition of said McMicken, and to the jurisdiction of this court, for this, that said suit is instituted by said McMicken to recover the contents of a promissory note, that said promissory note is alleged to be signed by James H. Ficklin, Jedediah Smith, and Amos Webb, and is drawn in favor of McMicken and Ficklin, or order, which Ficklin is alleged to be the said James H. Ficklin who signed said note. And it is further alleged, that said note was made and drawn after the dissolution of the firm of McMicken and Ficklin.

Now the said Mary Ann and Ira Smith except to the jurisdiction of this honorable court, for this, that said suit being brought by said Charles McMicken alone, to recover the contents of said promissory note, payable as aforesaid, (and by protestation of any assignment of said note)

said Mary Ann and Ira Smith say, that said McMicken can only institute suit thereon by virtue of some assignment of said promissory note; and said petition does not allege that the said Charles McMicken and James H. Ficklin, composing the persons designated in said note, as the payees thereof, could have prosecuted their suit, or that a suit could have been prosecuted in this court, against the makers of said note, at the time of *making* the same. Wherefore the said Mary Ann and Ira Smith pray the judgment of the court whether it will further take jurisdiction of this suit, and that the same be dismissed with costs.

2d. And the said Mary Ann and Ira Smith further secondly except to said petition, and to the jurisdiction of this court, for this, to wit: that in reciting, as in their first plea and exception to the jurisdiction is recited, and by protestation as therein is protested, the said petition does not allege that the payees might, at the time of *assigning* said note, have prosecuted, or that a suit might have been prosecuted at the time aforesaid, against the makers thereof, in this court. Wherefore the said Mary Ann and Ira Smith pray judgment as before.

Signed, EUSTIS.

And on the same day the following exceptions were filed, to wit:

To the honorable the judge of the district court of the United States for the eastern district of Louisiana:

Amos Webb, who is impleaded jointly with Mary Ann Smith, in her own capacity, and also as tutrix of her minor children, and Ira Smith, at the suit of Charles McMicken, comes and admits that he is a citizen of the State of Louisiana, and that he was in New Orleans when said petition, and the citation issued in pursuance of the prayer thereof, was served on him; but he, the said Amos, avers, that he resides in the parish of St. Landry, in the western district of Louisiana, as regards the jurisdiction of the district court of the United States. Wherefore he excepts to said petition, for want of jurisdiction in this court, and prays the judgment of the court, whether it will further take cognizance of this case as regards the said Amos Webb, and that the same be dismissed with costs, or that this suit, as regards the said Amos, be transferred to the western district of Louisiana, at the costs of the petitioner.

2. For further plea and exception to the jurisdiction of this court, said Amos Webb shews, that said suit is instituted by said McMicken to recover the contents of a promissory note, that said promissory note is alleged to be signed by respondents, James H. Ficklin and Jedediah Smith, and is drawn in favor of McMicken & Ficklin, or order, which Ficklin is alleged to be the said James H. Ficklin who signed the said note; and it is further alleged, that said note was made and drawn after the dissolution of the firm of McMicken & Ficklin. Now the said Amos Webb *excepts* to the jurisdiction of this honorable court, for this, that said suit being as aforesaid by said Charles McMicken alone, to recover the contents of said promissory note, payable as aforesaid, (by protestation of any assignment of said note) said Amos says, that said McMicken can only institute suit thereon by virtue of some assignment of said pro-

missory note; and said petition does not allege that the said Charles McMicken and James H. Ficklin, composing the said persons designated in said note as the payees thereof, might, at time *making* said note, have prosecuted their suit against the makers thereof in this court. Wherefore, the said Amos prays judgment of the court, whether it will further take jurisdiction of this suit, and that the same be dismissed with costs.

3rdly. And the said Amos further, thirdly, excepts to said petition, and to the jurisdiction of this court, for this: that reciting, as in the second plea, or exception, is recited, and by protestation, as therein is protested, the said petition does not allege that the payees might, at the time of *assigning* said note, have prosecuted, or that a suit might have been prosecuted at the time aforesaid, against the makers thereof in this court. Wherefore the said Amos prays judgment as before.

(Signed) EUSTIS, *Attorney*.

And on the 2nd of March, 1835, the following entry was made on the minutes, to wit:

*Monday, March 2nd*, 1835.

The court met pursuant to adjournment. Present, the Hon. Samuel H. Harper.

C. McMicken,
vs.
Amos Webb.

By consent of parties, this cause is continued until next term.

And afterwards, to wit, on the 26th of May, one thousand eight hundred and thirty-five, the following entry was made on the minutes:

*Tuesday, 26th May*, 1835.

The court met pursuant to adjournment. Present, the honorable Samuel H. Harper.

C. McMicken,
vs.
Amos Webb. } No. 3556.

This cause came on this day for a hearing before the court, and was argued by counsel for defendant, the plaintiffs' counsel reserving the right of arguing the cause by a brief.

And afterwards, to wit, on the 14th of December, 1835, the following entry was made on the minutes:

*Monday, 14th December*, 1835.

The court met pursuant to adjournment from last session. Present, Honorable Samuel H. Harper, judge.

C. McMicken,
vs.
Amos Webb, et als. } Plea to the jurisdiction.

The court having maturely considered the plea to the jurisdiction

made in this case, now order that the same be sustained, and that the plaintiff's petition be dismissed with costs.

And on the 7th day of January, 1836, the following petition for a writ of error was filed:

No. 3556.—For the district court of the United States, in and for the eastern district court of Louisiana.

CHARLES MCMICKEN,
vs.
AMOS WEBB, and MARY ANN SMITH, in her own rights, and as tutrix, &c., and Ira Smith, as tutor of the minors Catharine and Sarah Smith.

Into the said court, by his attorney, L. C. Duncan, comes the plaintiff herein, and shows to this honorable court that he is dissatisfied with the judgment rendered herein, dismissing his petition for want of jurisdiction in this court, this petitioner respectfully alleging and insisting that this honorable court has jurisdiction of the subject matter of this present suit, and should hear and determine the same according to law and justice.

Wherefore, this petitioner alleging and charging as error in the judgment of this honorable court, rendered herein on the 14th day of December, 1835, the dismissal of this case, respectfully prays, that a writ of error may be allowed herein according to law, on petitioner's complying with the requisites of the law, and the rules of this court. And as in duty bound, &c., &c., &c.

By his attorney, Signed, L. C. DUNCAN.

*Judge's Order.*

Be it so, on the plaintiff in error giving bond in the sum of five hundred dollars, with Paul Tulane as surety, conditioned according to law.

Signed, SAMUEL H. HARPER,
*Judge U. S.*

And on the same day the following bond for a writ of error was filed, to wit:

Know all men by these presents, that we, Charles McMicken as principal, and Paul Tulane as surety, are held and firmly bound unto Amos Webb, Mary Ann Smith, in her own right as tutrix, and Ira Smith, as tutor of the minors Catharine and Sarah Smith, in the full and just sum of five hundred dollars, to be paid to the said Webb, et als., their certain attorney, executors, administrators or assigns; to which payment well and truly to be made, we bind ourselves, our heirs, executors and administrators, jointly and severally, by these presents. Sealed with our seals, and dated this 7th day of January, in the year of our Lord one thousand eight hundred and thirty-six.

Whereas lately, at a district court of the United States for the eastern district of Louisiana, in a suit depending in said court between Charles McMicken and Amos Webb, et als., judgment was rendered against the said Charles McMicken, and the said Charles McMicken having obtain-

ed a writ of error, and filed a copy thereof in the clerk's office of the said court, to reverse the judgment in the aforesaid suit, and a citation directed to the said Amos Webb, et als., citing and admonishing to be and appear at a Supreme Court of the United States, to be holden at Washington the first Monday of August next.

Now the condition of the above obligation is such, that if the said Charles McMicken shall prosecute his writ of error to effect, and answer all damages and costs, if he fail to make his plea good, then the above obligation to be void, else to remain in full force and virtue.

Signed, C. McMICKEN, [SEAL.]
PAUL TULANE. [SEAL.]

Sealed and delivered in presence of—
Signed, H. F. DWIGHT.

And afterwards, to wit, on the 19th of January, in the year of our Lord one thousand eight hundred and thirty-six, the following writ of error was filed:

*United States of America, ss:*

The President of the United States, to the honorable the judge of the district court of the United States for the eastern district of Louisiana, greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said district court, before you, between Charles McMicken, plaintiff, and Amos Webb, and Mary Ann Smith, in her own rights, and as tutrix of the minors Catharine and Sarah Smith, and Ira Smith, as tutor of the minors Catharine and Sarah Smith, a manifest error hath happened, to the great damage of the said Charles McMicken, as by his complaint appears; we being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the first Monday of August next, in the said Supreme Court to be then and there held; that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States, should be done.

Witness the honorable Joseph Story, senior associate justice of the said Supreme Court of the United States, this second Monday of January, in the year of our Lord one thousand eight hundred and thirty-six, and the sixtieth year of the independence of the United States of America.

Signed, DUNCAN N. HENNEN, *Clerk*.

And on the 21st of November, 1837, the following answer was filed:

To the honorable the judge of the district court of the United States for the eastern district of Louisiana.

Amos Webb and Ira Smith, and Mary Ann Smith, in her own capa-

city, as well as tutor of the minor children Catharine and Sarah Smith, who are impleaded in this court at the suit of Charles McMicken, come, and not waiving the exceptions by them filed, as well to the jurisdiction as to the petition of the said Charles, but de bene esse, and in case said exceptions should be overruled, answer and say—

*General denial.*

*First*. That these respondents deny all and singular the allegations of the petition, except as hereinafter are admitted.

2nd. These respondents admit that said Amos Webb and Jedediah Smith signed the note sued on, and that said Jedediah is deceased, and said Mary Ann is his widow, now married to Ira Smith, and said Catharine and Sarah are his children, and said Ira and Mary Ann are tutor and tutrix of said minors; these respondents further answer and plead the exception of res judicata, for this, that the demand made and set up by the said Charles in his petition, and the whole subject matter in dispute between the parties, has been adjudged and passed upon by a court of competent jurisdiction, and judgment was rendered in favor of said Amos and Jedediah, and against the said Charles, for that the said Charles did heretofore assign and transfer the note mentioned and described in the petition, and all his right and interest therein, to Thomas Walker and Samuel P. Walker, carrying on business under the name of Thomas Walker & Co.; and the said Thomas Walker & Co., on or about 23d March, 1819, instituted a suit in the court of the third judicial district of the State of Louisiana, for the parish of Feliciana, against Jedediah Smith and said Amos Webb, for the not performing the said identical promises and undertakings in the said petition mentioned, and to recover the amount of the said note from them, jointly and severally; and such proceedings were thereupon had, that a verdict and judgment was thereupon given, and rendered in favor of said Jedediah Smith and Amos Webb, and against said Thomas Walker & Co., which judgment was signed on the 4th May, 1821, and remains in full force and virtue, and not reversed or made void; all which matters will more fully and at large appear by a copy of the record of said suit, which respondent annexes to this answer, and prays may be taken as part of the same; and which verdict and judgment respondents plead as res judicata of the matter and cause of action sued on by said Charles McMicken, as set forth in his petition. Wherefore, respondent prays that it be so adjudged, and that plaintiffs' petition be dismissed with costs.

And these respondents further also plead said judgment in bar, and as estoppel against said McMicken, to recover on said note against them.

3rd. For further plea and answer, if further plea and answer be necessary, these respondents further thirdly plead and answer, that they admit that said Charles McMicken and James H. Ficklin entered into partnership, as in said petition is alleged, and at the place alleged, and that said partnership was dissolved on or about 8th September, 1817.

These respondents also admit, that on the dissolution of said partner-

ship, the stock of goods of said partnership was taken by said Ficklin, at an advance of five per cent. on the cost; and they admit that the note, a copy of which is annexed to the petition, was signed by James H. Ficklin, Amob Webb, and Jedediah Smith. *But* this respondent denies that said note was made to said petitioner, and that said James H. Ficklin, Amob Webb, and Jedediah Smith, ever promised to pay said note, or the sum of money therein mentioned, to said Charles McMicken; and these respondents deny that said note or obligation was made to, and on behalf of, the said Charles McMicken, or that the name of McMicken & Ficklin was used, or intended to be used, for the sole use and benefit of said Charles McMicken, or that said Ficklin was not a party thereto, except as one of the obligors, and puts the said Charles McMicken on the strict proof of all the said allegations above denied. And these respondents insist, as by the face of said note appears, that said Ficklin was a joint payee of said note, and he, or his representatives, are jointly interested therein.

And these respondents further say, that it is well known to said McMicken, that said Ficklin signed said note as principal, and that said Webb and Jedediah Smith signed the same as sureties; and these respondents say, that said note was made without any consideration whatever, or that the consideration upon which the same was made, if any there ever was, has wholly failed, and that neither said Ficklin, as principal, or his representatives, nor said Jedediah Smith, nor Amos Webb, as sureties, ever were, or now are, bound or liable to pay the same.

*Special plea of failure of consideration.*

4. And these respondents for further answer to said petition shew, specially, a failure or want of consideration for said note, as follows, that as part of the terms of the dissolution of said co-partnership, in the petition referred to, it was agreed between the said Charles McMicken and James H. Ficklin, that the said James H. Ficklin should take all the co-partnership goods in hands at cost, with the addition of five per cent. on the whole amount, payable as follows, to wit: three thousand dollars by said Ficklin's draft on Flower & Finlay, then merchants in New Orleans, with their acceptance thereof, payable the 1st day of March, 1818, and their acceptance, or that of some other good house in New Orleans in their stead, for any further sum to meet or make up the one-half of the whole amount of the goods belonging to the said partnership, payable on the 1st May, 1818.

And these respondents further shew, that a further agreement was made between said Charles McMicken and James H. Ficklin, that for the remaining half of the value of said goods, taken as aforesaid, the said Ficklin was to give his joint note, with Amos Webb and Jedediah Smith as securities, payable on the 1st day of March, 1819; that said last mentioned note was given accordingly, and is the same note mentioned and described in said petition.

These respondents further shew, that said Ficklin did accordingly give the draft aforesaid for three thousand dollars, on the said Flower

& Finlay, payable on the 1st day of March, 1818; and did also give his draft on said Flower & Finlay, or on some other good house or mercantile firm in New Orleans, payable on the 1st day of May, 1818, for an amount sufficient to make up the sum of half the value or amount of said goods taken at the price aforesaid, and that said drafts were duly accepted, paid and satisfied.

And these respondents further shew unto your honor, that said Ficklin, as one of the partners of McMicken & Ficklin, was, at the time of the dissolution of said partnership, and when he gave his note jointly with Amos Webb and Jedediah Smith as aforesaid, one-half owner of the said co-partnership stock of goods, and entitled to one-half of any advance or profit which the firm of McMicken & Ficklin might make on the sale of the same; and having paid for one-half the value as aforesaid, by his drafts on Flower & Finlay as aforesaid, and being owner of one-half as aforesaid, the demand on the part of said McMicken, that said Ficklin should give his note, jointly with Amos Webb and Jedediah Smith, for the other half of said goods as aforesaid, and said McMicken taking and receiving the same, was either a fraudulent deceit and contrivance on the part of the said McMicken to deceive and defraud said Ficklin, and said Smith & Webb, or it was a mistake, error, and misconception by the said parties of their respective rights; and neither said Ficklin, nor said Webb or Smith, having ever received any consideration or value for said note, the same is null, void, and of none effect, and the demand of the payment of the same by the said McMicken is unconscientious and fraudulent.

*Confusion for one-half compensation.*

5. And these respondents for further answer say, that the note mentioned and described in the petition, was made and signed by James H. Ficklin as principal, and by Amos Webb and J. Smith as securities, in favor of Charles McMicken and James H. Ficklin, then partners in trade under the name of McMicken & Ficklin, and that partnership was dissolved long before said note became due; that by the dissolution of said partnership, or if said note was made upon or after said dissolution, said Ficklin was, and since his decease, the executors, heirs, or curator of said Ficklin is or are, entitled to receive one-half the amount of said note; and the said Ficklin, as principal, was, during his lifetime, and his executors, heirs or curator, since his decease, is or are the person or persons bound to pay the same. That confusion has thereupon taken place as to one-half of said note, and the same is satisfied, paid, and extinguished. That the said Webb and Jedediah Smith, as securities aforesaid, were thereupon discharged from the payment of one-half of said note, and all liability on account thereof. *And as to the other* half of said note, these respondents say, that said Ficklin being principal, and the said Jedediah Smith and A. Webb being only sureties therein, as was well known to petitioner, the same has been compensated and paid as follows: That on the dissolution of the partnership aforesaid, it was agreed between said McMicken and the said

Ficklin, that said McMicken should take, collect, and receive all the debts due to the said partnership, and by means thereof should pay all the debts due by said partnership.

Respondents shew, that said McMicken did accordingly take, collect, and receive all the debts due to the said partnership, and that he has collected and received accordingly, to the amount of twenty thousand dollars, more than he has paid on account of said partnership; and that said McMicken now is indebted to the curator, executors or heirs of said Ficklin, in the sum of $10,000 and upwards; which debt due by said McMicken to the curator, executors or heirs of said Ficklin, these respondents plead in compensation and payment of the other half of said note.

And these respondents say, that the whole of said note is now paid, satisfied, and extinguished, and these respondents discharged from any liability on account thereof.

*Compensation for the whole.*

And the respondents further answer and say, that if your honor should not decree that said J. H. Ficklin, or his curator, executors or heirs, since his decease, was or were entitled to one-half of said note, and the money due thereon, so as to operate confusion as above pleaded and answered, and should decree that petitioner is the sole owner and holder thereof, then these respondents plead and answer compensation to the whole amount of said note, in the manner and form in which it is above pleaded and answered to one-half thereof.

*Special plea that plaintiff must liquidate and settle with representatives of Ficklin as partner—that by delay to do so, he has lost recourse against sureties.*

And these respondents, sixthly, further answer and say, that Charles McMicken and James H. Ficklin being in partnership, as is alleged in the petition upon the dissolution of said partnership, it was agreed between them that said Charles McMicken should be put in full possession of all the books, notes, accounts, and all other papers relating to said firm, with full power to settle and collect all dues and demands owing to said firm, either at law or otherwise, by exchange or re-exchange of notes or accounts, or any other mode he might think advantageous to the concern, and when in funds sufficient to pay off all debts that are due by the firm aforesaid, to pay the same, until a full and final payment and settlement were made; and to employ, at his discretion, such person or persons as he shall think necessary for the completion of the business. And that said Ficklin was to take the goods on hand at cost, with the addition of five per cent. on the whole amount, payable as follows, to wit, three thousand dollars by his draft on Flower & Finley, with their acceptance thereof, payable the 1st March, 1818, and their acceptance in like manner, or that of some other good house in New Orleans in their stead, for any further sum, to wit, to make up the one-half of the whole amount of goods, payable on the first day of May,

1818, and for the remaining half, said Ficklin was to give his joint note, with respondent and Jedediah Smith, payable on the 1st day of March, 1819. That said Ficklin performed and fulfilled the terms imposed on him by said agreement, and the note sued on was given in pursuance thereof; that said McMicken did accordingly receive all the books, notes, accounts and papers of said partnership, and has collected the debts due to the same, and has never liquidated and settled the said co-partnership concerns, contradictorily with the representatives of the said Ficklin.

Now these respondents say, that said McMicken cannot equitably and justly institute any suit on said note, so joined in by respondent, *unless* and until he first liquidates and settles the co-partnership concern of McMicken & Ficklin.

That respondents allege, that said Ficklin died shortly after the dissolution of said partnership in 1817; but these respondents show to your honor, that said Ficklin made a will and appointed executors, one or more of whom proved said will and qualified and acted as executors, of the parish of Feliciana, under it in 1817, 1818, and 1819, and that after said executors were discharged, Thomas Walker, and afterwards Clarke Woodruff, were successively appointed curators of the vacant succession of said Ficklin, in this State, in 1819, '20, '21, '22, '23, contradictorily with whom said McMicken might have liquidated said partnership concerns; that by his negligence and delay in doing so, he has lost all right and remedy against said sureties in said note.

Wherefore these respondents pray the judgment of the court, that he be perpetually enjoined from instituting suit in said note.

*Special plea that note given to make up deficiency in settlement.*

7. And for further answer these respondents seventhly answer and say, that in the dissolution of the partnership aforesaid, the said McMicken and Ficklin made the agreement above set forth, and that with regard to the giving of the joint note of said Ficklin, Amos Webb and Jedediah Smith, respondents deny that there ever was any consideration for giving said note, but if any there ever was, (which is denied as aforesaid,) the same was as follows: that the said McMicken, apprehending or supposing that the debts due to the said partnership might not realize and produce an amount sufficient to pay the debts due by said partnership, (in which case it might be necessary to call upon said Ficklin to refund and return, for the payment of partnership debts, the value of the one-half of the partnership goods belonging to, received, and by him taken upon the dissolution thereof,) required it from said Ficklin, and imposed it on him, to give his note for the value of one-half the goods so belonging to and taken out by him, jointly with said Jedediah Smith and Amos Webb, as securities, in the manner and form in which the same was taken, in order to meet the one-half of any deficiency that might exist, if the debts due to said partnership did not realize and produce a sum sufficient to pay the debts due by said partnership; and for this reason it was said note was made payable to McMicken & Ficklin, and placed in the hands of McMicken as the partner charged with

the settlement of the partnership concerns. And respondent charges, that said McMicken collected and received, out of the debts due to said partnership, an amount more than sufficient to pay the debts due by the said partnership; and that if he did not, it was for him to make the same appear by a liquidation and settlement of said partnership concerns, contradictorily with the executors and curator of said Ficklin's succession; and that having wilfully neglected and omitted to do so, he has lost all right of action and remedy on said note against these respondents, it being to him known that said Webb and Jedediah Smith were sureties thereon.

And for further plea and answer these respondents say, that the said Ficklin being bound to pay the said note, or any part thereof, only conditionally, in manner and form as is above stated, viz, only in case the amount of debts and property due to McMicken and Ficklin, and which were to be received by said McMicken as settling partner, fell short of, and did not amount to the debts due by said partnership of McMicken and Ficklin, and to be paid by said McMicken in the course of the liquidation and settlement by him of said partnership affairs; and the said Ficklin being bound only to pay his share, part, or portion of such deficiency.

Whereas, in and by the obligation by which this respondent became surety for the purpose aforesaid, said Smith and Webb, on the face of said contract and note, are bound absolutely, and for the whole amount of said note, and said Smith, or his representatives, and said Amos Webb, as sureties, are not, and cannot, in any event, be bound for more than the said Ficklin, the principal debtor, was and is bound for, nor on more onerous conditions; and respondents pray that, if any debt be established against said Ficklin, the said suretyship may be reduced to the conditions of the principal obligation.

And these respondents further charge, that the omission of the purpose and intention with which said note was given in said act of dissolution, was either accidental or fraudulent on the part of said McMicken, and renders the said agreement, and note taken in pursuance thereof, ambiguous, and open to explanation. And respondents charge, that the present attempt to enforce the payment of the same against these respondents, is fraudulent, unconscientious, and unequitable; and these respondents pray your honor to decree that said McMicken be for ever enjoined from instituting suit on said note, and that he deliver up the same to be cancelled, or for such further and other relief as in equity and justice these respondents are entitled to receive and your honor shall be pleased to decree, and for trial by jury.

(Signed) GEORGE EUSTIS, *for defendants.*

And on the 16th of December, 1839, the following entry was made on the minutes:

December session, 1839.

*Monday, 16th December*, 1839.

The court met, pursuant to adjournment from last term: Hon. Philip

K. Lawrence, district judge, present; Hon. John McKinley, presiding judge, absent.

C. McMicken, vs. Amos Webb et al. } No. 135.

On motion of George Eustis, esq., for defendants, contradictorily with L. C. Duncan, esq., for plaintiff; and on filing the affidavit of James L. Sterling, ordered, that the plea puis darrien continuance be filed, and that a commission issue to James E. Davis, city judge of Fayette, or James L. Hickman, or any other justice of the peace of Fayette county, State of Kentucky, to examine witnesses.

And on the 16th day of December, 1839, the following affidavit of James L. Sterling was filed:

*State of Louisiana, city of New Orleans.*

Charles McMicken vs. Amos Webb and others. }

James L. Sterling being duly sworn, doth depose and say, that he has intermarried with Sarah Pirrie Smith, one of the defendants; that, since the last term of this court, he has been informed, and believes it to be true, that the plaintiff, Charles McMicken, has purchased from the heirs and legatees of the late James H. Ficklin, all the rights of the said heirs and legatees to the succession of the said James H. Ficklin; that it is possible that said McMicken has caused the title to said rights to be made to, and in favor of, some other person; but, if so, the same is held for the use, and in trust, for said McMicken, that if a commission to Kentucky be allowed him, he expects to prove all said facts.

(Signed) JAMES L. STERLING.

Subscribed and sworn, this 13th day of December, 1839, before me,

(Signed) C. WATTS, *Judge*.

And on the same day the following plea was filed, to wit:

Charles McMicken, vs. Amos Webb and others. }

These defendants, for further plea and answer in this case, come and shew to this honorable court, that since the last proceedings in this case, and since the last term of this court, the information came to the knowledge of these defendants, that said Charles McMicken has purchased out all the right, title, and interest, of the heirs and legatees of James H. Ficklin to the estate of the said James H. Ficklin, and has thereby become liable for the debts and obligations of the said James H. Ficklin; and that, if the said Charles McMicken has not received the conveyance of said rights to himself, the same has been made to some person for the use and in trust for said McMicken. That thereby confusion has taken place, and the said Charles McMicken can no longer prosecute this suit, being himself bound to pay the note sued upon.

(Signed) GEO. EUSTIS.

And afterwards the following entries were made on the minutes, to wit:

*Thursday, April 9th,* 1844.

The court met pursuant to adjournment. Present, the Hon. John McKinley, presiding judge; the Hon. Theo. H. McCaleb, district judge.

C. McMicken
vs.
Amos Webb et als. } No. 135.

On motion of counsel leave is granted to open the commission on file in this case; the counsel of both parties being present, and consenting, this case is set for trial for Tuesday next, the sixteenth instant.

On motion of L. C. Duncan, esq., of counsel for the plaintiff, it is ordered that the mandate from the Supreme Court of the United States be filed, and entered of record; and is in the words and figures following, to wit:

*United States of America:*

The President of the United States of America, to the honorable the judge of the district court of the United States for the eastern district of Louisiana, greeting:

Whereas lately, in the district court of the United States for the eastern district of Louisiana, before you, in a cause between Charles McMicken, plaintiff, and Amos Webb, and Mary Ann Smith, in her own right, and as tutrix of the minors Catharine and Sarah Smith, and Ira Smith, tutor of said minors Catharine and Sarah Smith, defendants, the judgment of the said district court was in the following words, viz:

The court having maturely considered the plea to the jurisdiction made in this case, now order that the same be sustained, and that the plaintiff's petition be dismissed at his costs, as by the inspection of the transcript of the said district court, which was brought into the Supreme Court of the United States by virtue of a writ of error, agreeably to the act of Congress in such case made and provided, fully and at large appears. And whereas, in the present term of January, in the year of our Lord one thousand eight hundred and thirty-seven, the said cause came on to be heard before the said Supreme Court on the said transcript of the record, and was argued by counsel; in consideration whereof, it is now here ordered and adjudged by this court, that the judgment of the said district court in this case be, and the same is hereby, reversed; and that this cause be, and the same is hereby, remanded to the said district court for further proceedings to be had therein, according to law and justice, and in conformity to the opinion of this court, February 2nd.

You, therefore, are hereby commanded that such further proceedings be had in the cause, in conformity to the opinion and judgment of this court, as according to right and justice, and the laws of the United States, ought to be had, the said writ of error notwithstanding.

Witness the honorable Roger B. Taney, chief justice of the said Supreme Court, the second Monday of January, in the year of our Lord one thousand eight hundred and thirty-seven.

(Signed) WM. THOS. CARROLL,
*Clerk of the Supreme Court of the United States.*

Minutes continued.

*Tuesday, April 16th,* 1844.

This cause having been assigned for this day, was continued until Friday, the 26th April, 1844.

*Wednesday, January 22nd,* 1845.

It is ordered that this cause be re-assigned for Wednesday, the 5th day of February, 1845, at 10 o'clock A. M.

*Wednesday, February 5th,* 1845.

This cause this day came on for trial pursuant to assignment; L. C. Duncan, esq., appearing for the plaintiff, and G. Eustis, esq., for the defendants.

By consent of counsel it is ordered, that the special jury drawn and summoned to serve in this case, be again summoned to appear on Wednesday, the 19th day of February inst., and that six more persons be added to said special jury by the marshal.

And it is further ordered, that this case be continued until Wednesday, the 19th February instant.

*Wednesday, February 19th,* 1845.

This cause came on for trial this day; L. C. Duncan and G. B. Duncan, esqrs., appearing for the plaintiff, and G. Eustis and Thos. Haynes, esqrs., for the defendants. And thereupon came a jury, to wit: W. L. Hodge, Wm. E. Thompson, James Hewitt, A. D. Kelly, H. S. Buckner, Wm. Alling, E. R. Stevens, Alexander Levy, E. J. Walsh, J. R. Connor, J. P. Nelson, and John Hagan, who were sworn well and truly to try the issue joined between the parties, and a true verdict give according to the evidence; when, after some considerable progress in the cause, at the hour of 3 o'clock, P. M., the cause was continued until to-morrow at 10 o'clock, A. M.

*Thursday, February 20th,* 1845.

The trial of this case was this day resumed before the court, and the jury heretofore sworn; L. C. Duncan and G. B. Duncan, esqrs., appearing for the plaintiff, and G. Eustis and T. Haynes, esqrs., for the defendants. Whereupon, after some considerable progress, and the hour of 3 o'clock having arrived, the cause was ordered to be continued until to-morrow at 10 o'clock, A. M., and the jury were discharged until then.

And on the 21st day of February, one thousand eight hundred and forty-five, the following judgment was rendered:

*Friday, February 21st,* 1845.

The court met pursuant to adjournment. Present, the honorable

Theodore H. McCaleb, district judge; the honorable John McKinley, presiding judge, absent.

C. McMicken
vs.
Amos Webb et als. } No. 135.

The argument of counsel in this case was this day resumed before the court, and the jury heretofore sworn; G. B. Duncan, esq., for the plaintiff, and G. Eustis and Thos. Haynes, esqrs., for the defendants. Whereupon, after the evidence and argument of counsel having concluded, and W. L. Hodge appointed foreman, the jury, under charge of the court, retired to their room to consider of their verdict, and soon returned with the following, which was ordered to be recorded, and is in the words and figures following, to wit:

"The jury in this case find a verdict in favor of the defendants. New Orleans, 21st February, 1845.

"W. L. HODGE, *Foreman.*"

Whereupon, it is considered by the court that judgment be entered according to said verdict in favor of the defendants, and that the plaintiff take nothing by his petition. And it is further ordered that said plaintiff be condemned to pay the costs of suit.

Judgment rendered February 21st, 1845. Judgment signed March 22nd, 1845.

(Signed) THEO. H. McCALEB, [SEAL.]
*U. S. judge.*

And on the same day the following bill of exceptions was filed, to wit:

*Mc* McMicken
vs.
Smith & Webb.

Be it remembered that, on the trial of this cause, the defendants offered in evidence the record of the case of Thomas Walker & Co., vs. Smith & Webb, No. 1,087, herewith annexed, and made part of this bill of exceptions, in support of their plea of res judicata as pleaded by them; to the admission of which the plaintiff, by his counsel, objected, on the ground that the parties in said suit were not the same as in the present suit; which objection was sustained by the court, who refused to admit the same in evidence before the jury; to which the counsel for the defendants except, and prayed that this bill be signed and sealed, which is done.

(Signed) THEO. H. McCALEB, [SEAL.]
*U. S. judge.*

The following transcript is referred to, and made a part of the above bill of exceptions.

To the honorable George A. Waggaman, judge of the third district court, parish of Feliciana, State of Louisiana:

The petition of Samuel P. Walker, formerly of the city of Baltimore, State of Maryland, now a resident of the city of New Orleans, State of Louisiana, and Thomas Walker, of the State and parish aforesaid, respectfully sheweth:

That, on the 20th day of September, A. D. 1817, one James H. Ficklin, Jedediah Smith, and Amos Webb, all of the State and parish first aforesaid, made and executed their joint and several promissory note, negotiable, unto McMicken & Ficklin, a commercial firm formerly of this parish and State aforesaid, payable on the 1st day of March, 1819, with interest at ten per cent. after due till paid, for the sum of four thousand eight hundred and sixty-six dollars and 93-100, for value received, signed by their own proper signatures.

Further sheweth, that the said note was legally transferred and endorsed, for a good and sufficient consideration, to your petitioners, then associated and transacting commercial business in the State and parish first aforesaid, under the name, style, and firm of Thomas Walker & Co., whereby the aforesaid Jedediah Smith and the said Amos Webb became indebted, jointly and severally, to your petitioners in the sum of money aforesaid, sheweth that the said sum of money has been legally demanded of the said Jedediah Smith and Amos Webb, and payment thereof positively refused; and the said sum of money has never been paid, nor any part thereof, by any person to your petitioners, to their very great damage and injury.

Wherefore, your petitioners pray that the said Jedediah Smith and the said Amos Webb be cited to appear before this honorable court according to law, and then and there be sentenced, adjudged, and decreed, to pay, jointly and severally, unto your petitioners the aforesaid sum of money, with interest and costs of suit, and other relief which is just and equitable by jury. In respect, &c.

C. WOODRUFF,
*Att'y for plaintiff.*

*St. Francisville, Sept. 20th*, 1817.

$4,866 93½. On the first day of March, 1819, we, or either of us, promise to pay, jointly or separately, unto McMicken and Ficklin, or order, four thousand eight hundred and sixty-six dollars ninety-three and a half cents, being for value received, with ten per cent. interest after due until paid.

JAMES H. FICKLIN,
JED. SMITH,
AMOS WEBB.

Endorsed.—Pay the within to Messrs. Thomas Walker & Co., or their order.

McMICKEN & FICKLIN,
Per C. McMICKEN.

I certify this was filed this 23rd March, 1819.

T. A. BROWDER, *Clerk.*

*District court.*

Mr. Jedediah Smith: You are hereby summoned to appear at the office of the sheriff of the parish of Feliciana, and comply with the prayer of the annexed petition, or file your answer thereto in writing, in the office of the clerk of the district court for the parish aforesaid, in ten days after the service hereof.

Witness the honorable Geo. A. Waggaman, judge of our said court, this 23rd day of March, in the year of our Lord 1819.

[SEAL.] T. A. BROWDER, *Clerk.*

Received March 24th, 1819; served the same day, by delivering a copy of this citation, with a copy of plaintiff's petition, to defendant.

W. H. BROWDER, *Dep. sheriff.*

*District court.*

Mr. Amos Webb: You are hereby summoned to appear at the office of the sheriff of the parish of Feliciana, and comply with the prayer of the annexed petition, or file your answer thereto in writing, in the office of the clerk of the district court for the third district for the parish aforesaid, in ten days after the service hereof.

Witness the honorable George A. Waggaman, judge of our said court, this 23rd day of March, in the year of our Lord 1819.

[SEAL.] F. A. BROWDER, *Clerk.*

Received March 24th, 1819; served 26th of March, 1819, by delivering a copy of this citation, with a copy of the plaintiff's petition, to defendant.

W. H. BROWDER, *Dep. sheriff.*

To the honorable the judge of the third district court for the State of Louisiana, sitting in and for the parish of Feliciana:

Jedediah Smith and Amos Webb, saving and reserving to *himself*, now, and at all times hereafter, the right and benefit of all manner of exception to the errors, irregularities, and misstatements, contained and set forth in a petition of Samuel P. Walker and Thomas Walker, exhibited against them in this honorable court, for answer thereto, or so much thereof as they are advised is material to be answered unto, answereth and saith: That, for any thing contained or set forth in said petition, these respondents are not bound or liable to pay to the said plaintiffs the sum of money claimed of them, for they say that the said petition sets forth that the notes were joint and several, and were given by three persons, to wit, James H. Ficklin, J. Smith, and A. Webb, and concludes only against two of the obligors, and it ought only to have been against one or all of them; wherefore the said suit ought to abate at the costs of the plaintiffs, and so your respondents pray.

They further say, that the said note has not been legally endorsed to the said plaintiffs; for these respondents say that, at the time of the said endorsements, no such firm *of* that of McMicken & Ficklin existed, but the firm under that name and style had been dissolved, of which the said plaintiffs had knowledge; wherefore these respondents say that they

are not bound or liable to pay the said sum of money to the said plaintiffs, and therefore pray that they may be dismissed at the costs of the said plaintiffs; and if any other or further answer is necessary they say, that if the said note was ever legally endorsed to the said plaintiffs, that still these respondents are not bound or liable to pay the same, for they say that the said note was given under particular and special circumstances, of which the said plaintiff had notice, and took and received the said note with full and perfect knowledge of all and singular the circumstances, to wit: The said Charles McMicken, jun., and James H. Ficklin were merchants, trading and dealing together under the name and style of McMicken & Ficklin; and, before the date of said note, the said persons mutually agreed to dissolve the partnership then existing between them, and for that purpose took an inventory and schedule of all their goods on hand, debts, and credits; and they believed that the said firm had made very considerable profits, say fifteen thousand dollars; that Charles McMicken, jr., was authorized, at the dissolution, to collect the debts due to the firm, and James H. Ficklin took the goods on his own account, and for which he gave his note, the note aforesaid, to the firm of McMicken and Ficklin, believing that he was entitled to them, he having paid for the other half to Charles McMicken, jr., by acceptances on merchants in New Orleans, which have been fully paid, and therefore this note was not given to Charles McMicken, jr., for his own use and benefit, but to the firm of McMicken & Ficklin, with this express understanding, to wit, that if the debts due the firm were sufficient to pay the debts due by the firm, that then, and in that case, this note should be given up to the said James H. Ficklin; and these respondents aver that they were fully ample, and fully sufficient, to pay all the debts due by the firm without the use of this note; wherefore they pray to be dismissed at the cost of the plaintiffs.

And they further say, that they are not bound or liable to pay the said notes, under any other or further circumstances, and pray to be dismissed at the cost of the plaintiffs; they further *say* that the plaintiffs, and particularly Thomas Walker, may answer on oath the following interrogatories:

1st. Did you not know that McMicken and Ficklin had dissolved partnership, on the day of the endorsement of the note mentioned in your petition?

2nd. Did you not know all the circumstances attending the dissolution of the partnership, and particularly those detailed in this answer?

3rd. Did you Thomas Walker not know before you received the notes referred to in your petition, the particular circumstances under which the firm was dissolved, and particularly that these notes were given for the goods on hand; and that Charles McMicken, jr., had the collection of the debts due to the firm? And did you not receive these notes from Charles McMicken, jr., without our consent, or the consent of James H. Ficklin? And do you not know that the facts detailed in this answer, as to the settlement of the business of the firm, is correct; and did you not know them before the notes were endorsed to you?

And did you not yourself receive the said notes of Charles McMicken, jr.?

J. TURNER, *Att'y.*

Personally, before the undersigned justice of the peace, appeared Jedediah Smith, and made oath, that he believes that the answers of one of the plaintiffs, Thomas Walker, to the above interrogatories, will be material in the defence of this case.

JED. SMITH.

Sworn and subscribed to, before me, this 28th March, 1819.

THOS. W. CHINN, *J. peace.*

Let the within interrogatories be answered agreeably to the prayer of the petition.

GEO. A. WAGGAMAN,
*Judge 3 district.*

I certify this was filed this 29th March, 1819.

T. A. BROWDER, *Clerk.*

THOMAS WALKER & CO.,
vs.
SMITH & WEBB.

*Third district court, parish of Feliciana, State of Louisiana.*

The answer of Thomas Walker, one of the above plaintiffs, in answer to the interrogatories propounded by defendants to respondent, says, in answer to the first interrogatory, *says*, that he did know of the dissolution by public report.

And to the 2nd interrogatory answers, that he does not, as he believes.

To the 3rd interrogatory answers, that the said C. McMicken was, as your petitioner believed at that time, and still does believe, authorized to collect the debts due the firm, and that this respondent does not know any of the particular circumstances under which the firm was dissolved, but by common report, and that respondent does not know of the note having been given for the goods on hand, but believes it was, from all the circumstances; and further, that respondent did receive the note from Charles McMicken, jr., and that respondent did not conceive it necessary to consult the drawees; and that he knows nothing of the facts detailed in the answer of defendants but what he has already stated above.

Before me, Frederick A. Browder, justice of the peace in and for the parish of Feliciana, and State of Louisiana, personally came and appeared Thomas Walker, one of the plaintiffs in the above entitled cause, and made oath, according to law, that the above answers to the interrogatories of defendants are just and true.

THOS. WALKER.

Sworn to and subscribed, before me, this 6th April, 1819.

T. A. BROWDER, *J. P.*

I certify this was filed 6th April, 1819.

T. A. BROWDER, *Clerk.*

THOMAS WALKER & Co., vs. SMITH & WEBB. } No. 1,087, April 8th, 1819.

Continued on affidavit of defendants.

THOMAS WALKER & Co, vs. SMITH & WEBB. } October 11th, 1819—No. 1,087.

Death of Thomas Walker, one of plaintiffs, suggested of record.

SAME vs. SAME. } October 14th, 1819—No. 1,087.

Jury waived by consent, and it is ordered that this suit be carried on in the name of Samuel P. Walker, surviving partner.

SAME vs. SAME. } October 14th, 1819—No. 1,087.

On the trial of this cause William Leake being sworn, deposeth, that he is acquainted with the handwriting of Jedediah Smith, and believes it to be his handwriting, and also of James H. Ficklin; he has frequently seen Jed. Smith write, and is acquainted with the handwriting of Charles McMicken, and believes it to be his signature.

Cross-examined.

He knew the firm of McMicken & Ficklin, and that the partnership was dissolved in the fall of 1817; a few days afterwards C. McMicken moved from said house to a house he purchased of Thomas Walker after the dissolution, and that the dissolution was a matter of public notoriety; and that Thomas Walker lived in St. Francisville at that time, and done business under the firm of Thomas Walker & Co.; he does not know whether the body of the endorsement is in the handwriting of C. McMicken or not, or the signature of McMicken & Ficklin is in the handwriting of McMicken.

By plaintiff.

The customary mode of settling partnership accounts with individuals, after a dissolution, is to take the notes payable to the firm.

Benj. H. Robinson being sworn, says, that it is always customary among merchants, that, when they dissolve their copartnership, they always settle the business in the name of the firm.

Benj. Collins sworn.—Is acquainted with the handwriting of Amos Webb, having frequently seen him write; he believes the signature to the note to be that of Amos Webb, but he never made any acknowledgment about it; and he has the same knowledge of Jed. Smith's handwriting, and he believes the signature to be his; and has the same knowledge of the handwriting of C. McMicken, and believes the whole writing on the back of the note to be in his handwriting; and has the same

knowledge of the handwriting of Jas. H. Ficklin, and believes the signature to be in his handwriting.

Cross-examined.

C. McMicken and Jas. H. Ficklin were partners in 1817, as merchants, but as to their property in that copartnership he knows nothing about; they dissolved partnership some time in the latter end of August or beginning of September, 1817; it was a matter of public notoriety that the partnership was dissolved—he heard it from one of the partners and others. Thomas Walker, one of the firm in this case, lived in St. Francisville in that year; knows nothing of the consideration of the note.

Agreement between McMicken and Ficklin, at the dissolution of their co-partnership, was adduced as evidence by plaintiffs and their signatures admitted.

Here the testimony closed.

T. A. BROWDER, *Clerk.*

Memorandum of an argument, made and entered into this 8th day of September, 1817, between Charles McMicken, jun., and James H. Ficklin, both of the town of St. Francisville, lately trading under the firm of McMicken and Ficklin; that they have this day by mutual consent dissolved their co-partnership aforesaid, and that Charles McMicken, jun., is put in full possession of all the books, notes, and accounts, and all other papers relating to the firm aforesaid, with full power to settle, and collect all the dues and demands owing to the said firm, either at law, or otherwise, by exchange or re-exchange, of notes or accounts, or any other mode he may think advantageous to the concern; and when in funds sufficient to pay *of* all debts that are due by the firm aforesaid, to pay the same, until full and final payment and settlements are made; and to employ at his discretion such person or persons as he shall think necessary, for the completion of the business; and that Jas. H. Ficklin take all the goods on hand at cost, with an advance of five per cent. on the whole amount, payable as follows, viz, three thousand by his draft on Flower & Finley, with their acceptance thereof, payable the 1st March, 1818, and their acceptance in the same manner, (or some good house in New Orleans in their stead,) for any further sum to meet the one-half of the whole amount of goods, payable on the 1st day of May, 1818, and for the remaining half he gives his joint note, with Amos Webb and Jedediah Smith, payable on the 1st March, 1819; and by the non-compliance of James H. Ficklin in giving the aforesaid acceptances, and note, this agreement to remain null and void, so far as the sale of the goods to him; and all the sales of goods by him, for the period of thirty days, the time allowed him to comply with the foregoing, shall be carried to the joint benefit of the last firm.

In witness whereof we hereunto subscribe our names, the day and date above written.

JAMES H. FICKLIN,
CHARLES McMICKEN.

SAMUEL P. WALKER, survivor, vs. SMITH & WEBB. } No. 1087.

*October* 14, 1819.

In this case after evidence and argument of counsel, the court took the same under advisement.

SAME vs. SAME. } No. 1087.

*October* 21*st*, 1819.

Judgment for plaintiff for four thousand eight hundred sixty-six dollars ninety-three and half cents, with ten per cent. interest from the first day of March, 1819, and costs of suit.

The law and evidence in this case being in favor of the plaintiff, it is therefore ordered, adjudged, and decreed, that judgment be rendered in favor of plaintiff, for four thousand eight hundred sixty-six dollars and ninety-three cents, with ten per cent. interest from the first day of March, 1819.

GEO. A. WAGGAMAN, *Judge*.

Oct. 21st, 1819.

To the honorable George A. Waggaman, judge of the third District court for the State of Louisiana, parish of Feliciana.

The petition of Jedediah Smith and Amos Webb, respectfully represents:

That Samuel P. Walker, surviving partner of the firm of Thomas Walker & Co., recovered judgment against these petitioners for the sum of four thousand eight hundred dollars and upwards, at this term of the said court, held at Jackson, in the parish of Feliciana, in the month of October.

Sheweth that the said judgment is illegal and erroneous, that your petitioners are entitled to an appeal to the Supreme Court. Now, therefore, they pray that your honor will grant them an appeal, returnable at such day as you may fix, to the said Supreme Court; and that a citation of appeal issue, and be served as the law directs, and duly returned, and that such other and further proceedings be had in the matter *of* the case may require.

J. TURNER,
*Atty. for appellants.*

Let an appeal be here, agreeably to the prayer of the petitioners, returnable into the supreme court in New Orleans, on the first Monday in January, 1820, the appellants giving freehold security in the sum of $5,500.

GEO. A. WAGGAMAN, *Judge*.

I certify this was filed October 22nd, 1819.

T. A. BROWDER, *Clerk*.

Know all men by these presents, that we, Jedediah Smith, Amos Webb and John Sterling, are held and firmly bound unto Samuel P. Walker, surviving partner of the firm of Thomas Walker & Co., his executors and administrators and assigns, in the sum of five thousand five hundred dollars, and for the payment hereof we bind ourselves, our heirs, executors and administrators, firmly by these presents. Sealed with our seals, dated this 26th day of October, 1819. Whereas, the above bound Jedediah Smith and Amos Webb, this day filed their petition of appeal from a final judgment rendered against them in the third district court of the State of Louisiana, for the parish of Feliciana, in favor of the said Samuel P. Walker.

Now, therefore, the condition of the above obligation is such, that if the said Jedediah Smith and Amos Webb shall prosecute their said appeal with effect, and shall pay, or perform any judgment that may be rendered therein against them, or if the execution that may issue shall be satisfied out of their proper goods or chattels, lands and tenements, then and in such case the above obligation to be void, else to remain in full force and virtue.

JED. SMITH, [SEAL.]
AMOS WEBB, [SEAL.]
JNO. STERLING. [SEAL.]

I certify this was filed Oct. 27th, 1819.

T. A. BROWDER, *Clerk*.

S. P. WALKER, surviving, &c.,
vs.
SMITH & WEBB. } No. 1087.

*April* 13*th*, 1820.

This cause having been remanded from the supreme court was ordered to be put on the docket, and the opinion of the supreme court filed.

Supreme court of the State of Louisiana, Wednesday, March 29th, 1820, the court met.

Present, the honorable George Matthews, the hon. Peter Derbigny, the hon. F. X. Martin.

S. P. & THOS. WALKER, appellees,
vs.
J. SMITH & A. WEBB, appellants,

Appeal from the district court for the third judicial district.

In this case the court now delivered their opinion, in the words and figures following, to wit:

The judgment complained of in this case does not contain the reasons in which it is founded; we must therefore, as we have done in other similar cases, avoid and reverse it.

Proceeding to enquire whether the case is so presented as to enable us to adjudicate upon its merits, we find that a diminution of the record has been suggested by the counsel for the appellee, who has stated on oath, that a certain part of the statement of facts, agreed upon by the

parties, to wit, the second fact said in the transcript of the record to have been stricken out, was erased without his knowledge, and that upon this suggestion, and without any order of this court to that effect, the clerk of the third district court has come forward, and sent up the original statement of facts, certifying at the same time, that he knows not whether the erasures which appear on the face of it were made by consent, or by whom they were made.

In that situation of the case, however irregular this mode of proceeding may have been, the documents, the transcript of which is complained of *is* incomplete, being now before us, no technical difficulty ought to prevent us from ascertaining, by its examination, whether it is such a statement of facts as the parties may be bound by. This statement contained four facts, distinctly and separately set forth under the numbers 1, 2, 3, & 4; it leaves at the bottom the signatures of the respective attornies of the parties, and that of the judge; but of these facts one is found erased, and the clerk cannot tell whether these erasures were made by consent, or by whom they were made; what is to be presumed? The signatures of the parties are affixed at the bottom of a writing as an acknowledgment, that they approve of that which is written; but when a paper is mutilated and defaced, is an approval of the alterations to be inferred? ought not the clerk, who received it, to be able to certify at least that the parties did jointly deliver it to him in its present state? and if he cannot certify even that, would there be any justice in making an instrument thus disfigured binding on them? Parties are no doubt at liberty to blot and scratch their written agreements as much as they please; however objectionable the practice, there is nothing illegal in it; but when they do so alter what was written, they ought to take care that the alterations shall appear to have been made by consent; for if the consent neither is expressed, nor can be ascertained, and is denied by one of the parties, it shall not be presumed to have been given; this then not appearing to be the statement of facts agreed upon by the parties, the appeal stands as if it was not accompanied by any statement at all; we are therefore under the necessity of remanding the cause.

It is therefore ordered, adjudged, and decreed, that the judgment of the district court be annulled, avoided, and reversed; and that this cause be remanded with instructions to the judge to render judgment therein in the manner pointed out by the constitution; and it is further ordered, that the costs of this appeal be paid by the appellee.

A true copy.

[SEAL.] H. F. DEBLIEUX, *D. C.*

I certify this was filed, April 13th, 1820.

F. A. BROWDER, *Clerk.*

S. P. WALKER, S. Partner, vs. SMITH & WEBB. } No. 1087.

*April 2nd*, 1821.

C. Woodruff, esq., counsel for the plaintiff, moved the court for an execution on the judgment last rendered in this case, taken under advisement.

SAME vs. SAME.—No. 1087.

*April 3rd*, 1821.

*Motion overruled.*

On motion of C. Woodruff, esq., ordered that this cause be reinstated on the docket for trial.

SAME vs. SAME.—No. 1087.

*April 17th*, 1821.

This cause came on to be heard, also came a jury, to wit: David McCants, William N. Miller, Jeremiah Walker, Benjamin Prescott, Samuel Tuell, Hiram Bradford, Benjamin Kendrick, John C. Boon, David Campbell, Augustus Bougart, Alexander Crawford, jr., who being sworn and empannelled, and after evidence, and the charge from the court, they retired, and by consent the jury will seal up their verdict.

We find for defendants with costs of suit.

W. N. MILLER, *Foreman.*

The verdict of the jury, law and evidence, being in favour of the defendants, it is therefore ordered, adjudged, and decreed by the court, that judgment be rendered for the defendants for costs of suit.

*Third district court, parish of Feliciana,*
*State of Louisiana:*

THOMAS WALKER, et als.
vs.
SMITH & WEBB.

Be it remembered, that on 17th day of April, A. D. 1821, this cause then and there being on trial, plaintiff offered C. McMicken, endorser of the note upon which this suit was brought, as a witness to prove, that the note was transferred in settlement of the partnership business of the payees of said note, and that said payees received a credit for the amount immediately on the transfer to plaintiffs; defendants objected to his introduction *of* the ground of interest; this objection was sustained by the opinion of the court, and the witness was rejected. Plaintiffs by their counsel excepts.

April 17th, 1821.

ROBERT LAWES,
*Judge of 3d district court, Louisiana.*

The verdict of the jury and the evidence being in favor of the defendants, it is therefore ordered, adjudged, and decreed by the court, that judgment be rendered for the defendants for costs of suit.

ROBERT LAWES,
*Judge 3rd judicial district, Louisiana, May 4th*, 1821.

*State of Louisiana, parish of Feliciana,*
*Third district court:*

SAMUEL P. WALKER, S. partner,
vs.
SMITH & WEBB.

In this case it is agreed by the undersigned counsel, that the following is a statement of the written documents, and of the facts given in

evidence on the trial of said cause, to wit, the note was proved to have been executed by the defendants and James H. Ficklin, the written agreement of the dissolution of the partnership between James H. Ficklin and Charles McMicken, hereto annexed.

The written memorandum of the purchase and sale from Thomas Walker and Charles McMicken, dated 24th September, 1817, hereto annexed.

The endorsement upon the back of the note, as there written, was proved to have been in the handwriting of Charles McMicken.

C. WOODRUFF,
*Atty. for plaintiff.*
J. TURNER,
*Atty. for defts.*

I certify this was filed, May 5th, 1821.

T. A. BROWDER, *Clerk.*

*Third district court, parish of Feliciana,*
*State of Louisiana.*

THOMAS WALKER & Co., by S. P. WALKER, Surviving partner,
vs.
J. SMITH & A. WEBB.

To the honorable judge of said court; plaintiff, in above cause, respectfully sheweth, that on the day of April, 1821, a judgment was rendered by this honorable court in this case, against petitioners, with which plaintiff is dissatisfied.

Wherefore he prays that an appeal be allowed according to law, and made returnable to the supreme court of this State, on the first Monday of June, 1821.

C. WOODRUFF,
*Atty. for plaintiff.*

Let an appeal be granted in conformity with the prayer of the within petition, returnable to the supreme court on the first Monday of June, 1821, petitioner giving bond and security in the sum of two hundred dollars.

ROBERT LAWES,
*Judge 3rd judicial district, Louisiana.*

May 3rd, 1821.

I certify this was filed May 3rd, 1821.

T. A. BROWDER, *Clerk.*

*State of Louisiana, parish of East Feliciana,*
*Third district court:*

I, Lee Hardesty, clerk of said court, do hereby certify, that the foregoing is a true and complete transcript of the record, and all the papers on file, in the case of Thomas Walker & Co., vs. Smith and Webb, No. 1087, of the suits of said court, for the parish of Feliciana.

Given under my hand and seal of office, at Clinton, this 18th day of August, A. D. 1829.
[SEAL]
(Signed,) L. HARDESTY, *Clerk*.

And on the 25th day of February, 1845, the following entry was made on the minutes:

*Tuesday, February 25th*, 1845.

The court met pursuant to adjournment. Present: the honorable Theo. H. McCaleb, district judge; the honorable John McKinley, presiding judge, absent.

C. McMICKEN, vs. A. WEBB & als. } No. 135.

On motion of G. B. Duncan, counsel for plaintiff, it is ordered, that the defendants shew cause, on Monday the 3rd day of March, 1845, at 10 o'clock, why the verdict of the jury should not be set aside, and a venire facias de novo awarded on the following grounds, to wit:

1st. The said verdict is contrary to law and evidence.

2d. The error of the court in restricting the evidence of the plaintiff, and refusing him the privilege of shewing a settlement of the partnership of McMicken & Ficklin, referred to in the pleas of defendants by record evidence, though the same was consummated after the issue joined in this case.

3d. The misdirection of the judge to the jury in the charges asked for by the defendants, except as to the first.

4th. The error of the judge in refusing the charges numbered 4 and 7, asked for by the plaintiff.

5th. That it is impossible to render judgment on the verdict, because of its uncertainty, or upon what issue it was rendered.

If the above motion be refused, then, on like motion it is ordered that said defendants do shew cause, at the same time, why judgment should not be arrested, on the ground of the uncertainty of the issue upon which said verdict was given; and if any judgment be given, that the same be one of non-suit.

And on the 10th of March, 1845, the following entry was made on the minutes, to wit:

McMICKEN, vs. A. WEBB and als. } No. 135.

The rule taken herein by the plaintiff on the defendant, to shew cause why the verdict of the jury should not be set aside, and a venire facias de novo awarded, was this day taken up for hearing; G. B. Duncan, esq., appearing for the plaintiff, and G. Eustis, esq., for the defendant; when, after hearing argument of counsel, the court took the case under advisement.

Minutes.—March 17th, 1845.

C. McMicken, vs. Amos Webb and als. } No. 135.

The court having considered the rule for a new trial taken herein, it is ordered that the same be dismissed.

The following testimony was offered in evidence by plaintiff, on the 19th of February, 1845:

Note of J. H. Ficklin, Jed. Smith, and Amos Webb, dated Sept. 20th, 1817.

$4866 93½ *St. Francisville, Sept. 20th*, 1817.

On the first day of March, 1819, we, or either of us, promise to pay, jointly or separately, unto McMicken and Ficklin, or order, four thousand eight hundred and sixty-six dollars, ninety-three and a half cents, being for value received, with ten per cent. after due until paid.

Signed, JAMES H. FICKLIN,
JED. SMITH,
AMOS WEBB.

Transcript of record, T. Walker & Co. vs. Chas. McMicken, 3d district court.

To the honorable George A. Waggaman, judge of 3d district court, parish of Feliciana, State of Louisiana:

Walker & Co. vs. McMicken. } No. 1088.

The petition of Samuel P. Walker, formerly of Baltimore, State of Maryland, and now a resident of the city of New Orleans, State of Louisiana, and Thomas Walker, of the State and parish first aforesaid, heretofore associated and transacting commercial business in the town of St. Francisville, and State first aforesaid, under the name, style and firm of Thomas Walker & Co., respectfully sheweth:

That Charles McMicken, of the State and parish first aforesaid, is justly indebted to your petitioners in the sum of four thousand eight hundred and *thirty*-six dollars and 93¾ cents, as by reference to the annexed note of hand, negotiable or written obligation, made and drawn by James H. Ficklin, formerly of this parish, (now deceased) and Jedediah Smith and Amos Webb, joint and several, in favour of McMicken and Ficklin, a commercial firm then existing in the State and parish first aforesaid, and composed of the said Charles McMicken and James H. Ficklin, and endorsed by the said McMicken and Ficklin, per said Charles McMicken, to your petitioner, for a good and valuable consideration, paid the said Charles by your petitioner, which is prayed to be taken as part of this petition, will more fully appear.

Further sheweth: That your petitioners have made use of all due diligence to obtain the payment of said note from all the drawers aforesaid, *to wit*, the estate of James H. Ficklin, (deceased) through his ex-

ecutors, lawfully appointed, viz, Jedediah Smith and Andrew Skilman, both of this parish and State aforesaid, as well as from Jedediah Smith, in his individual capacity as drawer, and Amos Webb, all of the parish and State first aforesaid; and that your petitioners have been unable to obtain the payment thereof from the drawers aforesaid; and further, that they have neglected and positively refused the same; and further, that the said Charles McMicken has been duly and legally notified by your petitioner of the refusal and non-payment aforesaid, and the said sum of money has been amicably and legally demanded of him, the said Charles, by your petitioners, but payment thereof has been hitherto neglected and refused by him, to the great damage and injury of your petitioners.

Wherefore, your petitioners pray that the said Charles McMicken be cited to appear before this honorable court, according to law, and then and there be sentenced and adjudged to pay your petitioners, jointly and separately, the said sum of four thousand eight hundred and sixty-six dollars and 93¾ [cents,] with interest as aforesaid, and damages and costs of suit, and other relief, as is just and equitable, by jury.

C. WOODRUFF,
*Att'y for Pl'ffs.*

And further, petitioners pray that the said Charles McMicken, *in* answer on oath, whether Thomas Walker, one of the plaintiffs, did not give said Charles notice of the demand he had made on the drawers of said note, and demand the amount from said Charles; and was not said notice given in the course of two or three days after said note became payable.

C. WOODRUFF,
*Att'y for Pl'ffs.*

I certify this was filed this 23rd March, 1819.

T. A. BROWDER, *Clerk.*

*District Court.*—No. 1088.

Mr. Charles McMicken: You are hereby summoned to appear at the office of the sheriff of the parish of Feliciana, and comply with the prayer of the annexed petition, or file your answer thereto in writing, in the office of the clerk of the district court for the third district, for the parish aforesaid, in ten days after the service hereof.

Witness the honorable George A. Waggaman, judge of our said court, this 23d day of March, in the year of our Lord 1819.

T. A. BROWDER, *Clerk.*

Received March 24th, 1819.—Served the same day by delivering a copy of this citation, with a copy of the pl'ffs' petition, on defendant.

W. H. BROWDER, *Dep. Sh'ff.*

*District Court.*

Mr. Charles McMicken: You are hereby summoned to appear at the office of the sheriff of the parish of Feliciana, and comply with the prayer of the annexed petition, or file your answer thereto in writing,

in the office of the clerk of the district court for the third district, for the parish aforesaid, in ten days after the service hereof.

Witness the honorable Geo. A. Waggaman, judge of our said court, this 21st day of April, in the year of our Lord 1820.

F. A. BROWDER, *Clerk.*

Received April 21st, 1820.—Served same day by delivering a copy of this citation, with a copy of the plaintiffs' petition, to defendant.

W. H. BROWDER, *Dep. Sheriff.*

Returned and filed April 21st, 1820.

*Return on Petition.*

Served April 21st, 1820, by delivering a copy of this petition to defendants.

W. H. BROWDER, *Dep. Sheriff.*

THOMAS WALKER & Co.
vs. } No. 1088.
CHARLES McMICKEN.

*April 6th*, 1819.

In this case it is ordered, that Josiah Parson shew cause forthwith why he has not attended as a witness in this case.

SAME,
vs. } No. 1088.
C. McMICKEN.

*April 8th*, 1819.

Continued on affidavit of defendant.

SAME,
vs. } No. 1088.
C. McMICKEN.

*Third district court, parish of Feliciana, and State of Louisiana:*

Death of Thomas Walker, one of the plaintiffs, suggested record.

THOMAS WALKER,
vs. } No. 1088.
CHARLES McMICKEN, JR.

In the third district court. Interrogatories to be put to Wright, a witness for the defendant in this cause:

1st. Do you know the parties in this cause?

2d. Do you know any thing of the defendant's purchasing the stock of merchandise which the plaintiff had in St. Francisville in 1817?

3d. Did not Mr. Walker receive in payment for said goods, a joint note signed by James H. Ficklin, Jed. Smith and Amos Webb?

4th. Look upon the copy of a note to these interrogatories attached, and say, from the tenor thereof, if it is not, as far as you can recollect, such a note as was received by Mr. Walker from Mr. McMicken in payment for said goods?

5th. Look at the peculiar endorsements of said note, and say if you do not recollect some difficulty in the making the same; and particularly endeavor to recollect whether Mr. Micken did not refuse to endorse said note; and did he not finally consent to endorse it, in the manner it appears endorsed, in consequence of the express stipulation on the part of Mr. Walker, that he, Mr. Micken, should not be called upon for payment, until the drawers proved insufficient; and on this stipulation alone was not said note endorsed?

6th. Relate every thing you know concerning the endorsement of said note, as if thereunto particularly interrogated?

JAMES M. BRADFORD,
*Attorney for Respondents.*

I certify this was filed this 30th day of August, 1819.

F. A. BROWDER, *Clerk.*

*Answer.*

*Third district court, parish of Feliciana,*
*State of Louisiana:*

The answer of Charles McMicken, jr., to the petition exhibited against him in this honorable court by Samuel P. Walker and Thomas Walker, says, that the petitioners ought not to have and maintain their said petition, for this: That by their own shewing respondent is not liable, in his own person, for the note on which said petition is founded; for if indeed such a note was ever made and endorsed, said note was drawn and made by James H. Ficklin, Jedediah Smith and Amos Webb, and payable to McMicken & Ficklin, and by them endorsed and made payable to the petitioners. Now, the petitioners have mistook their remedy; for if any they have it is against the drawers and maker of said note, and the endorsers, McMicken & Ficklin, if endorsed as is alleged.

And further answering respondent says, that all the allegations in said petition contained are untrue, and he is not indebted in manner and form as is alleged, or in any other manner whatsoever.

And further answering respondent says, that even if it should appear that he endorsed said note, which however he expressly denies, he has been released from all liability as endorser, by the negligence of the holders of said note, in demanding payment of the makers and drawers, and notifying respondent of their refusal to pay said note, neither of which was ever done; wherefore, the premises considered, respondent prays to be hence dismissed with costs.

J. M. & D. BRADFORD,
*Attorneys for Respondent.*

I certify this was filed this 5th April, 1819.

T. A. BROWDER, *Clerk.*

Answer of C. McMicken to interrogatories.

*Third district court, parish of Feliciana, State of Louisiana:*

THOMAS WALKER & Co.
vs.
CHARLES McMICKEN.

Charles McMicken, in answer to the interrogatories propounded by the plaintiff to him, says, some few days after the note to the petitioners' petition attached became due, Thos. Walker, now deceased, one of the original plaintiffs, called at defendant's store, holding in his hand a twisted or folded paper, which was not opened during his stay; and after some general conversation, observed to defendant, "I have seen the gentlemen as you requested, and now do not know what to do," or words of that import and meaning; and although the note to petition attached was not mentioned, nor was any person named by said Thomas Walker, defendant did believe the gentlemen spoken of were the drawers of the note. If this is considered by the court as notice to defendant of demand of payment by said Thomas Walker of the drawers of said note, then defendant says notice was given; but if this is not considered by the court as notice, then no notice was given.

But to the last branch of the interrogatory defendant says, that Thomas Walker did not demand payment of said note of defendant, for it was one of the conditions expressly stipulated between the said Thomas Walker and defendant, which induced him to endorse said note, that he, defendant, should not be called upon for payment of said note, until the drawers were found to be unable to pay it by due course of law; and on that condition, and that condition alone, the endorsement was made. This agreement was made in the presence of Norris Wright, clerk of said Thomas Walker.

C. McMICKEN.

Sworn to and subscribed before me, this 25th April, 1820.

F. A. BROWDER, *J. P.*

I certify this was filed April 25th, 1820.

T. A. BROWDER, *Clerk.*

WALKER & Co.
vs.
McMICKEN.
Oct. 12th, 1819.

Leave to amend by putting interrogatories to defendant.

WALKER & Co.
vs.
McMICKEN.
No. 1,088.—April 24th, 1820.

Defendant is allowed until to-morrow morning, ten o'clock, to answer the interrogatories, and be ruled to trial at that time.

THOMAS WALKER & Co.
vs.
CHARLES McMICKEN.
April 25th, 1820.

This cause came on to be heard, and also came a jury, viz, Parsons Carter, W. Bell, G. Piper, James Dunbar, Z. Hawsey, Thomas Simp-

son, James Flowers, L. Davis, B. Deeson, A. Whittaker, J. Bell, Jas. Carpenter, who, after being sworn and empannelled, according to law, and commenced the evidence, the court adjourned.

SAMUEL WALKER, surviving Partner, &c. vs. C. McMICKEN. } April 26th, 1820.

Jury all present.

*Document O.*

We, the undersigned, do bind ourselves to observe the following relation to a sale of merchandise and house and lot made to Charles McMicken, for which we received the following notes:

| | |
|---|---|
| Flower & Finley, acceptance due 1st March, 1838 - | $3,000 00 |
| Do do 1st May - - | 1,866 93¾ |
| J. H. Ficklin, Jed. Smith, & A. Webb, note 1st March, 1839 - - - - - - - | 4,866 93 |
| Charles McMicken's note, due 1st May, 1818 - - | 4,376 18 |
| Do do do 1819 - - | 4,376 18 |
| Do do do 1820 - - | 9,243 10 |
| | $27,729 32 |

It is understood by the undersigned, that Charles McMicken has the right of extending the payment of three thousand and eighty-one dollars and four cents, or any part thereof, until the 1st of May, 1821, and one-third of that payment falling due 1st May, 1820, for twelve months thereafter, paying interest as expressed in the notes. It is also understood, that should Charles McMicken make any payment on the notes previous to their becoming due, that he is to be allowed interest on the same.

*St. Francisville, 24th September*, 1817.

THOS. WALKER & CO.

Approved. CHARLES McMICKEN.

*Exceptions.*

THOMAS WALKER & Co. vs. CHARLES McMICKEN. } Feliciana.—3d District Court.

The court in its charge to the jury said: "It is the opinion of this court, that it is immaterial whether the note was proved to be made and subscribed by the drawers thereof or not; the mere endorsement by the defendant gave it currency, and thereby he is liable;" and further instructed the jury, "that a written notice was not required of refusal to pay the note." To which opinion and instruction of the court, defendant, by his counsel, begs leave to except, and have this bill of exception signed.

GEO. A. WAGGAMAN, *Judge*.

I hereby certify this was filed April 26th, 1820.

F. *H.* BROWDER, *Clerk*.

*Third district court, parish of Feliciana,*
*State of Louisiana:*

THOMAS WALKER & Co.
vs.
CHARLES MCMICKEN.

Andrew Skillman, a witness for plaintiffs, being on his cross-examination, defendant's counsel asked this question: "Do you know the consideration for which the note to petition attached was given?" Plaintiffs' counsel opposed the answering of the question—which opposition was sustained by the court, and the answering thereof rejected. To this opinion of the court, defendant, by his counsel, begs leave to except.

GEO. A. WAGGAMAN, *Judge.*

*Third district court, State of Louisiana,*
*Parish of Feliciana:*

THOMAS WALKER & Co.
vs.
CHARLES MCMICKEN.

The defendant, by his counsel, offered a written instrument, signed James H. Ficklin and Charles McMicken, jr., and offered to prove the signature by the witness Andrew Skillman, then on the stand—a copy of said instrument is attached to this exception, and is marked "X"—the introduction and proof of the paper was opposed by the counsel for plaintiff, and sustained by the court. To this opinion of the court, defendant, by his counsel, begs leave to except.

GEO. A- WAGGAMAN, *Judge.*

I certify this was filed April 25th, 1820.

F. A. BROWDER, *Clerk.*

Copy of document marked "X."

Memorandum of an agreement made and entered into this eighth day of September, 1817, between Charles McMicken, jun., and James H. Ficklin, both of the town of St. Francisville, lately trading under the firm of McMicken and Ficklin, that they have this day by mutual consent dissolved their co-partnership aforesaid, and that Charles McMicken, jun., is put in full possession of all the books, notes, and accounts, and all other papers relating to the firm aforesaid, with full power to settle and collect all dues and demands owing to the said firm, either at law, or otherwise, by exchange or re-exchange, of notes or accounts, or any other mode he may think advantageous to the concern; and when in funds sufficient to pay off all debts that are due by the firm aforesaid, to pay the same, until full and final payments and settlements are made; and to employ at his discretion such person or persons as he shall think necessary, for the completion of the business; and that James H. Ficklin takes all the goods on hand at cost, with the addition of five per cent. on the whole amount, payable as follows, to wit, three thousand by his draft on Flower & Finley, with their acceptance thereof, payable the 1st March, 1818, and their acceptance in the same manner, (or some

good house in New Orleans in their stead,) for any further sum to meet the one-half of the whole amount of goods, payable on the first day of May, 1818; and for the remaining half he giving his joint note, with Amos Webb and Jedediah Smith, payable on the first March, 1819; and by the non-compliance of James H Ficklin in giving the aforesaid acceptance and note, this agreement to remain null and void, so far as the sale of the goods to him; and all the sales of goods by him, for the period of thirty days, the time allowed him to comply to the foregoing, shall be carried to the joint benefit of the late firm.

In witness whereof we hereunto subscribe our names, the day and date above written.

JAMES H. FICKLIN,
CHARLES McMICKEN, Jun.

Third district court, parish of Feliciana.

I hereby certify the annexed agreement was the one read in evidence on the trial of the cause, between Samuel P. Walker et als., against Jedediah Smith and Amos Webb, and on which judgment was rendered in said court on the 21st October, 1819, from which judgment an appeal was taken to the supreme court.

Given under my hand and seal of office, this 21st February, 1820.

[L. S.] F. A. BROWDER, *Clerk*.

I certify this was filed this 21st February, 1820.

T. A. BROWDER, *Clerk*.

Supreme court, filed February 28th, 1820, No. 419.

H. F. DEBBONAT, *D. C.*

A true copy of the original, this day delivered to Charles McMicken, under an order of court Dec. 20th, 1823.

L. HARDESTY, *Dep. clerk*.

Received of the clerk of the third district court the original, of which the foregoing is a true copy, Dec. 20th, 1823.

C. McMICKEN.

Attest: L. HARDESTY, *Dep. clerk*.
Filed Dec. 20th, 1823. L. HARDESTY, *Dep. clerk*.

State of Louisiana, third district court, parish of Feliciana.

THOMAS WALKER & Co.,
vs.
CHARLES McMICKEN.

Andrew Skillman was offered by plaintiffs as a witness; the court was asked by defendant's counsel to swear him on his *voire dire;* this course was opposed by plaintiffs' counsel, as not being the present practice, but that the witness must be sworn in chief; when on examination, interest appeared, that the whole of the testimony of the witness would be rejected; the court sustained the objection, and the witness was sworn in chief; to this opinion of the court defendant by his counsel begs leave to except; on the outside of his testimony, the witness proved that he was the execu-

tor of the estate of Ficklin, and it does appear by the records of the court that witness is sued by plaintiffs as executor of Ficklin for this same amount, which suit is now pending and undetermined in this court; on this discovery, defendants' counsel moved to reject the testimony in *toto;* the objection was overruled, and the witness proceeded to testify; to this opinion of the court defendant by his counsel begs leave to except.

GEO. A. WAGGAMAN, *Judge.*

I certify this was filed April 25th, 1820.

F. A. BROWDER, *Clerk.*

Third district court, parish of Feliciana, State of Louisiana.

THOMAS WALKER & Co., }
vs. }
CHARLES MCMICKEN. }

This cause being called, defendant's counsel moved for an attachment against David B. Finley, a witness for defendant, whose attendance they shewed they had used due diligence to procure; the court require *them* to set forth in writing what he expected to prove by said witness, so that the plaintiffs might admit what was set forth without the attendance of the witness; what was expected to [be] proven was reduced to writing, and is in substance, that there was a written agreement between the plaintiff and defendant, which is now hereunto attached and marked "O," by which written agreement it appears that a note is received in payment, made by J. H. Ficklin, Jed. Smith, and Amos Webb, which does not appear by said agreement to have been either endorsed or not endorsed by witness; it was expected to be proven that the note now sued on was that note, and after so received in payment, a verbal agreement was made between the parties by which the plaintiff, Walker, agreed with defendant, that if he would endorse the said note he, defendant, should not be compelled to pay said note, until it was made appear by due course of law that the drawers was unable to pay the same. The attachment issued, and the parties ruled to trial; the sheriff made return to court during the process of the trial, that Mr. Finley was prevented attending from inability, being too much indisposed to attend, when defendant's counsel applied to the court for remedy in this dilemma; the court delivered its opinion, that even if the witness were in court he could not be permitted to testify to any verbal agreement between the plaintiffs and defendant, such as was expected to be proven; the written agreement was read by consent of counsel, and deft. ordered to proceed in the cause; to this opinion of the court defendant by his counsel begs leave to except, and have this his bill of exception signed.

GEO. A. WAGGAMAN, *Judge*

I certify this was filed April 26th, 1820.

T. A. BROWDER, *Clerk.*

SAMUEL P. WALKER, surviving partner, &c., vs. C. McMICKEN. } No. 1088.

The court proceed with the cause, and after evidence and argument of counsel, and received the charge from the court, the jury retired to consider of their verdict, and returned the following: we, the jury, find for the plaintiff four thousand eight hundred and sixty-six dollars ninety-three and a half cents, with ten per cent. interest from the 1st of March, 1819.

JAMES CARPENTER, *Foreman.*

The verdict of the jury being in favor of the plaintiff, it is therefore ordered, adjudged, and decreed by the court, that judgment be rendered for the plaintiffs for the sum of four thousand eight hundred and sixty-six dollars ninety-three and a-half cents, with 10 per cent. interest from the first of March, 1819.

GEO. A. WAGGAMAN.

*Decree of the supreme court.*

Supreme court of the State of Louisiana, Monday, January 15th, 1821.

The court met:

Present, the honorable George Matthews, the honorable F. X. Martin, the honorable Alexander Porter.

S. P. & C. WALKER, appellees, ad. CHAS. McMICKEN, appellant. } No. 503.

*Appeal from the third judicial district court.*

In this case this day, this court this day delivered their opinion in writing, in the words and figures following, to wit:

This is a suit on a promissory note, brought by the appellees, (who were plaintiffs in the court below,) as endorsers of the appellant; it appears from the evidence in the case that the note was made payable to a commercial firm, the business of which had been carried on in the name of McMicken & Ficklin, and that it was endorsed by the former to the appellees, for a valuable consideration, after the dissolution of the partnership; according to the laws of partnership, it seems to be a settled doctrine, that after the dissolution of a firm one of the partners can transfer by endorsement the negotiable papers which belong to the co-partnership, unless under express authority, given to that effect by the persons jointly interested; for the present, it is contended that such authority is vested in the appellant, by the articles of agreement which dissolved the partnership of McMicken & Ficklin; this agreement gives a right to McMicken to collect all debts due to the firm, and to pay to such as might be owing by it, and for this purpose he is put in possession of all the books, notes, &c., belonging to said firm, with power to exchange notes and accounts in the adjustment and settlement of the

partnership concerns; here, it is true, there is power given to transfer or exchange notes, but it is limited to a specific purpose, *to wit*, the final settlement of their partnership affairs, and an endorsement of transfer made for any other purpose, not being in pursuance of the power, is void. It is shewn by a contract between the parties to the present suit, (found on the evidence of the cause,) that so far from the note in question having been endorsed or exchanged in settling the business of the late firm of McMicken and Ficklin, it was given in payment for property purchased by the appellant for his sole and individual benefit; the transfer was made without authority on the part of the endorser, and ought not to be subject to the ordinary rules, relative to demand of payment from the makers of the note, and notice to endorsers; by such an endorsement the endorsers did not acquire a right to pursue the drawer for the recovery of the amount of the note, in their own name; but as the endorser received from them its full value, we are of opinion that he is bound to pay to them the same therein specified, as on an original contract.

This view of the case precludes the necessity of inquiry as to the sufficiency or insufficiency of the notice alleged, and attempted to be proven by the appellees.

It is therefore ordered, adjudged, and decreed, that the judgment of the district court be affirmed, with costs.

A true copy. N. B. LE BRETTON, *Clerk*.

I certify this was filed April 17th, 1821.

T. A. BROWDER, *Clerk*.

*Statement of Facts.*

*Third district court, parish of Feliciana,*
*State of Louisiana:*

THOS. WALKER & Co.
vs.
CHARLES MCMICKEN.

It is agreed by C. Woodruff and James M. Bradford, counsel for plaintiffs and defendants, that all the facts of this case are to be found in the record and written testimony taken down by the clerk, and this is a statement of the same to the Supreme Court.

*April 27th*, 1820.

C. WOODRUFF,
*Att'y for Pl'ff.*
JAMES M. BRADFORD,
*Att'y for Def'ts.*

I certify this was filed 29th day of April, 1820.

The State of Louisiana, to the sheriff of the parish of Feliciana, greeting:

We command you, that you demand from Charles McMicken the sum of four thousand eight hundred and sixty-six dollars ninety-three and one-half cents, with ten per cent. interest from March 1st, 1819, until

paid; also the sum of fifty-five dollars twenty-nine and a half cents, costs of court, which Samuel P. Walker, surviving partner, lately recovered by judgment of the third district court for the parish of Feliciana; and if he shall not pay the same on demand, that then you cause the same to be made out of the personal estate of the said Charles McMicken, except slaves, in your parish, if sufficient personal estate, exclusive of slaves, can be found therein; but if sufficient personal estate of said Charles McMicken, exclusive of slaves, cannot be found in your parish, that then you cause the said sum to be made of the real estate and slaves of said Charles McMicken, in your parish, whereof he was owner on the 26th day of April, 1820, part into whose hands soever the same may have come; and that you have those monies before our said court, to render to the said S. P. Walker, surviving partner, &c., for the judgment aforesaid, on the 2nd Monday of September next, together with this writ.

Witness the honorable Lawes, judge of said court, this 9th day of July, A. D. 1821.

L. HARDESTY, *Dep. Clerk.*

Rec'd July 10th, 1821, at 11 o'clock, A. M.

*August* 16*th*, 1821.

This day, by virtue of this written fi. fa., I have seized one lot of ground, situated in the parish of Feliciana and town of St. Francisville, being lot No. 1, in square No. 7, fronting 60 feet on Royal street, and running back one hundred and twenty feet, with store-houses, kitchen, and other improvements thereon; also a tract of land situated in aforesaid parish, lying on the west side of Alexander creek, bounded north and west by lands of the widow Bridges, on the east by said creek, south and west by lands belonging to the heirs of Samuel Flower, being the same land formerly viewed by Hugh Coyle, containing about two hundred and thirty acres; sixteen hundred acres of land on Bluff's creek; two hundred and fifty acres of land on Thompson's creek; one lot of ground in St. Francisville, fronting sixty-six feet on Royal street, being lot No. 7, in square No. 9, opposite the store of Semple and Sterling; and one negro slave, called Tutus, a man.

*Sept.* 22*d*, 1821.

This day the above described property was appraised as follows: The lot and improvement whereon defendant lately resided in St. Francisville, at $5000; the lot No. 7, in square No. 9, at $600; the 1600 acres of land on Bluff creek, at $1600; the 230 acres of land on Alexander, at $2000; the 250 acres of land on Thompson's creek, at $800; and the negro man Titus, at $800; making, in the whole amount, $10,800, cash.

*Sept.* 22*d*, 1821.

This day all the above property, with all the right, title, and claim of the defendants, was exposed to sale, according to law, and each separate parcel was repeatedly cried, but not any of the lands or lots were sold,

for want of bids to the amount required by law. The negro man, Titus, after repeatedly crying, was adjudged to Col. Wm. S. Hamilton, he being the last and highest bidder, for the price and sum of six hundred and forty-two dollars, cash.

B. COLLINS, *Sheriff.*

Since which time, and before the next day of sale, the plaintiffs' attorney, by J. D. Coll, ordered all further proceedings to be stayed, which is accordingly done.

B. COLLINS, ESQ.

*Dear Sir:* The proceedings on the execution, Walker vs. McMicken, have been stayed by order of the plaintiff. You will therefore suspend further proceedings. Yours,

J. D. COLL, *for Woodruff.*

*Oct. 3d*, 1821.

WALKER, surviving partner, &c.
vs.
CHARLES McMICKEN.

We, the undersigned, having been called on by the sheriff of the parish of Feliciana, to say how much of the property of the defendant he shall seize, to satisfy the plaintiff in the sum of about $6360, say he must and ought to seize one lot in St. Francisville, whereon said defendant lately resided, and had his store, with all the improvements; also a tract of land of about 230 acres, being the same formerly owned by Hugh Coyle; 1600 acres of land on Bluff creek; 250 acres of land on Thompson's creek; one lot [in] St. Francisville, opposite Semple and Stirling's store; one negro man, named Titus.

*Aug. 18th*, 1821.

F. A. BROWDER.
THOS. COOPER.

*Third district court, parish of Feliciana,*
*State of Louisiana:*

SAMUEL P. WALKER
vs.
CHARLES McMICKEN.

T. A. BROWDER, ESQ.

*Sir:* As clerk of the aforesaid court, you will please to deliver to Mr. Charles McMicken, the note of hand drawn by James H. Ficklin, Jed. Smith, and Amos Webb, for $4866 93½, and upon which this suit was brought, and judgment rendered against said Charles McMicken, the defendant, as endorser on said note. You will also please enter satisfaction on this judgment, under the direction of said McMicken, when required so to do, agreeably to a settlement made on the 12th September, 1821, with Col. Thomas Tenant.

McLANAGHAN & BOGART,
*Ag'ts for Plaintiffs.*

*New Orleans, April 27th*, 1822.

I certify this was filed May 10th, 1822.

F. A. BROWDER, *Clerk.*

*Third district court, parish of Feliciana,*
*State of Louisiana:*

SAMUEL P. WALKER
vs.
CHARLES McMICKEN.

F. A. BROWDER, ESQ.

*Sir:* As clerk of the aforesaid court, you will please to deliver to Mr. Charles McMicken the note of hand drawn by James H. Ficklin, Jed. Smith, and Amos Webb, for $4866 93½, and upon which this suit was brought, and judgment rendered against said Charles McMicken, the defendant, as endorser on said note. You will also please enter satisfaction on the judgment, under the direction of said McMicken, when required so to do, agreeably to a settlement made on the 12th September, 1821, with Col. Thos. Tenant.

McLANAGHAN & BOGART,
*Agents for Plaintiffs.*

*New Orleans, April 27th,* 1822.

$4866 93½. *St. Francisville, Sept. 20th,* 1817.

On the 1st day of March, 1819, we, or either of us, promise to pay, jointly and separately, unto McMicken and Ficklin, or order, four thousand eight hundred and sixty-six dollars, ninety-three and a half cents, being for value received, with ten per cent. after due until paid.

JAMES H. FICKLIN,
JED. SMITH,
AMOS WEBB.

Received original note, of which this is a true copy, May 27th, 1822.
C. McMICKEN.

Endorsed.—Pay the within to Messrs. Thomas Walker & Co., or their order.

McMICKEN & FICKLIN,
Per C. McMICKEN.

I certify the above to be a true copy of the order and note on file in my office this 10th May, 1822.

F. A. BROWDER, *Clerk.*

The clerk of the district court for the parish of Feliciana, is directed to deliver to C. McMicken the within mentioned note, on filing a certified copy of the same.

THOMAS BUTLER,
*Judge 3d district.*

*State of Louisiana, parish of East Feliciana:*

I certify that the foregoing nineteen pages contain a full and complete transcript of the record and all documents on file, and all proceedings

had, in the suit [of] Thomas Walker & Co. against Charles McMicken. No. 1,088 of the suits of the third district court.

Given under my hand and seal of the aforesaid court, this 11th day of February, 1845. [SEAL.]

(Signed) L. HARDESTY, *Clerk*.

I, Isaac Johnson, presiding judge of the third judicial district court for the State of Louisiana, parish of East Feliciana, do hereby certify, that Lee Hardesty, who signed the foregoing certificate, is the clerk of the third district court of the State of Louisiana, parish of East Feliciana, and was so at the time of signing said certificate, and that full faith and credit are due to his acts as such, and that the foregoing certificate is in due form of law.

Witness my hand, this 14th day of February, A. D. 1845.

(Signed) ISAAC JOHNSON, *Judge 3rd District*.

*Articles of Agreement.*

Articles of co-partnership agreement, made and entered into this ninth day of June, in the year of our Lord one thousand eight hundred and fifteen, between Charles McMicken, junr., and James H. Ficklin, both of the parish of Feliciana, and State of Louisiana. And we do, each with the other, covenant and agree to enter into the mercantile business at this place, and to be styled and known in trade under the firm of McMicken & Ficklin, which shall continue from year to year until a dissolution of this agreement takes place in the manner hereafter mentioned. And whereas, it is uncertain as to the amount of capital or stock in trade to be furnished, therefore, be it understood, in the following manner, that all moneys advanced by either party shall be considered as stock in trade—except so far as the advances of one party being greater than the other, that greater sum or balance in favor of the one party so advancing, shall be accounted for and paid by the firm when required by the party who advanced it, with ten per cent. interest per annum, and shall be considered as money borrowed by the firm.

There shall be a regular set of books kept in double entry, shewing all and every transaction relative to the business—of all goods purchased and sold—of all moneys received and paid away—and all contingent expenses relative thereto, so that a clear view of the business at all times can be seen. And all profits or losses arising in this co-partnership trade, under this agreement, shall be participated in jointly and equal.

This agreement to stand in full force and effect until a dissolution takes place in one of the following ways: First, by death of either party. Second, by mutual consent. And lastly, by one party giving at least three months' notice in writing to the other party, setting forth his reasons for so doing. At which time, an equal division and settlement shall take place of the whole concern of the firm.

In testimony whereof, we have hereunto interchangeably set our hands and affixed our seals, the day and date above written, at St. Francisville.

(Signed) JAMES H. FICKLIN, [SEAL.]
CHARLES McMICKEN, JR. [SEAL.]

*Dissolution of Co-partnership.*

Memorandum of an agreement made and entered into this eighth day of September, 1817, between Charles McMicken, junr., and James H. Ficklin, both of the town of St. Francisville, lately trading under the firm of McMicken & Ficklin, that they have this day, by mutual consent, dissolved their co-partnership aforesaid; and that Charles McMicken, junr., is put in full possession of all the books, notes, and accounts, and all other papers relating to the firm aforesaid, with full power to settle and collect all dues and demands owing to the said firm, either at law or otherwise, by exchange or re-exchange, of notes or accounts, or any other mode he may think advantageous to the concern. And when in funds sufficient to pay off all debts that are due by the firm aforesaid, to pay the same until *a* full and final payments and settlements are made; and to employ, at his discretion, such person or persons as he shall think necessary for the completion of the business.

And that James H. Ficklin takes all the goods on hand at cost, with the addition of five per cent. on the whole amount, payable as follows, viz: three thousand by his draft on Flower & Finley, with their acceptance thereof, payable the 1st March, 1818; and their acceptance in the same manner (or some good house in New Orleans in their stead) for any further sum to meet the one-half of the whole amount of goods payable on the first day of May, 1818; and for the remaining half he gives his joint note, with Amos Webb and Jedediah Smith, payable on the 1st March, 1819. And by the non-compliance of James H. Ficklin in giving the aforesaid acceptances and note, this agreement to remain null and void, so far as the sale of the goods to him; and all the sale sof goods by him, for the period of thirty days, the time allowed him to comply *to* the foregoing, shall be carried to the joint benefit of the late firm.

In witness whereof, we hereunto subscribe our names, the day and date above written.

JAMES H. FICKLIN,

(Signed CHARLES McMICKEN, Jr.

*(B.)*

Transcript of record—C. McMicken vs. Weems, curator.—Petition.

To the honorable John B. Dawson, parish judge, and ex-officio judge of the court of probates, in and for the parish of West Feliciana, State of Louisiana.

The petition of Charles McMicken, a citizen of the State of Ohio, late of Pennsylvania, now at St. Francisville, respectfully sheweth: That, heretofore, a commercial partnership existed between your petitioner and one James H. Ficklin, now deceased, which was dissolved, by mutual consent, on the 8th day of September, 1817. That a final settlement of the affairs of said partnership, as between your petitioner and said Ficklin, or his estate since his death, has never been made; and that there is a large sum, the sum of five thousand dollars, due by the estate of said Ficklin to your petitioner, out of the matters unsettled of said partnership.

And your petitioner further represents, that in addition to the sum due your petitioner on the unsettled accounts aforesaid, the estate of said Ficklin is indebted to your petitioner in the further sum of four thousand eight hundred and sixty-six dollars ninety-three and a half cents, with ten per cent. interest per annum from the first day of March, 1819, until paid, being the amount of a note drawn in solido by said Ficklin, and Jed. Smith and Amos Webb, on the 20th of September, 1817, by mistake and error, in favor of McMicken & Ficklin, but which was really due and designed to be made payable to your petitioner alone. A copy of the agreement dissolving the partnership, and of said note, are for greater certainty annexed to this petition. That said sum, or a settlement of the affairs of said partnership has been frequently in vain demanded of the representative of said Ficklin.

Wherefore, your petitioner prays your honor, that James J. Weems, of said parish, curator of the estate of Ficklin, and Robert Haile, counsel of absent heirs, also of said parish, may be cited in due course of law to answer this complaint; that auditors may be appointed to settle the accounts of the late firm of McMicken & Ficklin; that a final and complete settlement may be made by your honor; and that the curator of the estate of Ficklin may be compelled, by a judgment and decree of your honor, to pay to your petitioner the said sum of five thousand dollars due on the unsettled accounts, or such sum as may be found to be due, together with the said sum of four thousand eight hundred and sixty-six dollars 93½ cents, with ten per cent. interest from the 1st of March, 1819, until paid, as due on said note, and the costs of suit; and that such other and further relief may be granted, as the nature of the case may require.

DOWNES, *Att'y for Petitioner.*
*January* 1*st*, 1830.

I accept service of the within petition.

ROBERT HAILE,
*Att'y for the absent heirs of James H. Ficklin, dec'd.*

I accept service of the within petition, waiving the necessity of citation.

JAMES J. WEEMS,
*Curator of Jas. H. Ficklin's succession.*

*St. Francisville*, 3*d Jan'y*, 1831.

Filed January 17th, 1831.

B. COLLINS, *Clerk.*

*Agreement.*

Articles of co-partnership agreement made and entered into this ninth day of June, in the year of our Lord one thousand eight hundred and fifteen, between Charles McMicken, junr., and James H. Ficklin, both of the parish of Feliciana, and State of Louisiana. And we do, each with the other, covenant and agree to enter into the mercantile business at this place, and to be styled and known in trade under the firm of Mc-

992.



Micken & Ficklin, which shall continue from year to year, until a dissolution of this agreement takes place in the manner hereinafter mentioned. And whereas, it is uncertain [as] to the amount of capital or stock in trade to be furnished, therefore be it understood, in the following manner, that all moneys advanced by either parties shall be considered as stock in trade, except so far as the advances of one party being greater than the other, that greater sum or balance in favor of the one party so advancing shall be accounted for and paid by the firm, when required by the party who advanced it, with ten per cent. interest per annum, and shall be considered as money borrowed by the firm.

There shall be a regular set of books kept in double entry, shewing all and every transaction relative to the business—of all goods purchased and sold—of all moneys received and paid away—and all contingent expenses relating thereto, so that a clear view of the business at all times can be seen. And all profits or losses arising in this co-partnership trade, under this agreement, shall be participated in jointly and equal.

This agreement to stand in full force and effect until a dissolution takes place in one of the following ways: First, by death of either party. Second, by mutual consent; and lastly, by one party giving at least three months' notice in writing to the other party, setting forth his reasons for so doing. At which time an equal division and settlement shall take place of the whole concern of the firm.

In testimony whereof, we have hereunto interchangeably set our hands and affixed our seals, the day and date above written, at St. Francisville.

JAMES H. FICKLIN, [SEAL.]
CHARLES McMICKEN. [SEAL.]

Memorandum of an agreement made and entered into this eighth day of September, 1817, between Charles McMicken, jun., and James H. Ficklin, both of the town of St. Francisville, lately trading under the firm of McMicken & Ficklin, that they have this day, by mutual consent, dissolved their copartnership aforesaid, and that Charles McMicken, jun., is put in full possession of all the books, notes, and accounts, and all other papers relating to the firm aforesaid, with full power to settle and collect all dues and demands owing to the said firm, either at law or otherwise, by exchange or re-exchange, of notes or accounts, or any other mode he may think advantageous to the concern, and when in funds sufficient to pay *of* all debts that are due by the firm aforesaid, to pay the same, until *a* full and final payments and settlements are made; and to employ at his discretion, such person or persons as he shall think necessary, for the completion of the business.

And that James H. Ficklin takes all the goods on hand at cost, with the addition of five per cent. on the whole amount, payable as follows, viz: three thousand by his draft on Flower and Finley, with their acceptance thereof, payable the 1st March, 1818, and their acceptance in the same manner, (or some good house in New Orleans in their stead,) for any further sum to meet the one half of the whole amount of goods, payable on the first day of May, 1818; and for the remaining half, he

gives his joint note, with Amos Webb and Jedediah Smith, payable on the 1st of March, 1819, and by the noncompliance of James H. Ficklin, in giving the aforesaid acceptances and notes, this agreement to remain null and void, so far as the sale of the goods to him; and all the sales of goods by him for the period of thirty days, the time allowed him to comply *to* the aforegoing, shall be carried to the joint benefit of the late firm.

In witness whereof, we hereunto subscribe our names the day and date above written.

JAMES H. FICKLIN,
CHARLES McMICKEN.

Dolls. 4866 93½. *St. Francisville, Sept. 20th*, 1817.

On the first day of March, 1819, we, or either of us, promise to pay jointly or separately, unto McMicken and Ficklin, or order, four thousand eight hundred and sixty-six dollars ninety three and half cents, being for value received, with ten per cent. after due until paid.

JAMES H. FICKLIN,
JED. SMITH,
AMOS WEBB.

I certify that the foregoing is a true copy of the originals, which were filed in the suits of Charles McMicken *vs.* James J. Weems, curator of James H. Ficklin, dec'd, No. 108, in the court of probates, and which said originals were withdrawn by an order of said court, made on the 27th March, 1832.

J. MADISON, *Dep. Clerk.*

Received, St. Francisville, 31st March, 1832, of the clerk of the court of probates, the originals of which the foregoing are copies.

C. McMICKEN.

Filed 31st March, 1832.

J. MADISON, *Dep. Clerk.*

*Answer.*

*In the probate court, parish of West Feliciana,*
*State of Louisiana:*

CHARLES McMICKEN,
vs.
JAS. J. WEEMS, curator of the succession of Jas. H. Ficklin, dec'd. } Remembered by No.

The defendant in the above entitled cause comes into court in proper person, and answering to the petition exhibited against him, denies each and every allegation in plaintiff's said petition contained, particularly that the succession of James H. Ficklin, administered by this respondent, is indebted to Charles McMicken in the manner and form as stated, or in any other manner or form.

JAMES J. WEEMS,
*In proper person.*

Filed January 17th, 1831.

B. COLLINS, *Clerk.*

*Record.*

*State of Louisiana, parish of West Feliciana:*

At a session of the probate court, of the parish and State aforesaid, at the court house of said parish, in the town of St. Francisville, on Monday, the 17th day of January, 1831, being the third Monday of said month. Present, the hon. John B. Dawson, judge of said court.

CHARLES MCMICKEN,
vs.
JAS. J. WEEMS, curator of est. of James H. Ficklin. } No. 108.

On motion and by consent, it is ordered, that Murdock McQuien, on the part of the plaintiff, and William Leeche, on the part of the defendant, be appointed auditors, (and the court appointed Benjamin Collins to act as umpire,) to examine and report upon the accounts between the plaintiff and the estate of James H. Ficklin, under the late firm name of McMicken & Ficklin, that they make their report to this court, on or before the third Monday of February next. Further ordered, that defendant have leave to file his amended answer, by the next regular term of this court, making any exception or defence that he would or could now do, and cause continued

*Answer of absent heirs.*

CHARLES MCMICKEN,
vs.
The est. of JAMES H. FICKLIN.

Court of probates, in and for the parish of West Feliciana, and State of Louisiana.

The counsel for the absent heirs of the said James H. Ficklin, deceased, Robert Haile, comes into court and says, that he denies all and singular the allegations in plaintiff's petition contained, and requires strict proof thereof; and prays that the above instituted suit may be dismissed at the costs of petitioner.

ROBERT HAILE,
*Counsel for the absent heirs.*

Filed January 28th, 1831.

B. COLLINS, *Clerk.*

C. MCMICKEN,
vs.
JAS. J. WEEMS, Curator of est. of J. H. Ficklin. } No. 108.

*Award of arbitrators.*

At a session of the court of probates, in and for the parish of West Feliciana, State of Louisiana, on Monday, the 17th day of January, 1831, the following order was made: On motion and by consent, it is ordered by the court, that Murdock McQuien, on part of the plaintiff, and William Leake, on the part of defendant, be appointed auditors; and

the court appointed Benjamin Collins as umpire, to examine and report upon the accounts between the plaintiff and the estate of James H. Ficklin, under the late firm of McMicken & Ficklin, and that they make their report to this court on or before the third Monday of February next.

I certify the foregoing is a true extract from the minutes of the court.

B. COLLINS, *Clerk.*

January 21st, 1831.

We, and each of us, do solemnly swear, that we will perform all the duties enjoined on us by law as auditors, appointed by the parties, in the above cause, wherein Charles McMicken is plaintiff, and James J. Weems curator, &c., is defendant.

WILLIAM LEAK,
M. McQUIEN.

Sworn to and subscribed before me, this 21st day of January, 1831.

JAMES M. BRADFORD, *J. P.*

We waive the necessity of the three days notice required by law, and consent that the auditors proceed forthwith to the discharge of the duties imposed on them by the above order.

C. McMICKEN, *plaintiff.*
JAMES J. WEEMS,
*Curator of estate of Jas. H. Ficklin, deft.*

List of balances due McMicken and Ficklin, on their books at date.

Isaac Johnson acct., $14.82; Walter McLellan, $280.17; John Miller, $1.00; James Scott, jun., $9.21; Wm. Brannon, $163.51; Margaret Ketler, $16.67; Andrew Skilman, $19.66; John Ross, $64.72; Farley Eady, $98.12½; John J. Ravencamp, $3.00; Wm. Gudin, $14.61; Darius S. Johnson, $10.93; Jordan Phillips, $586.98½; David Davis, $80.06; Daniel Daugherty, $51.75; Daniel H. Brandon, $145.12; Thomas S. Smyth, $137.08; Isaac W. Robertson, $20.94; Barnell J. Reddish, $70.01; Joseph Bays, $108.33; John Simmons, $3.50; Wm. W. Chambers, $3.50; Samuel Bogan, $80.69; Joseph Johnson, $1.75; John Reynolds, $29.31; Jesse Perry, $126.25; Robert Shannon, (memorandum act.,) $10.42; Robert McDonald, do., $2.00; John Brown, $1.25; Polly Bowles, $26.00; Elizabeth Carrigan, $16.12 —$2,201.52.

List of notes receivable, belongable to McMicken and Ficklin, at date.

Arch. Robinson, note, $57.50; Robert S. Reed, $31.81; Daniel H. Bremson, $334.56¼; Daniel McLedan, $431.40; Lewis Ficklin, $19.68; Tully Robertson, $193.57; William Bollong, $81.25; John Miller, $3; all amounting to $237.69; Samuel Adams, judgments, $111.85; Benjamin Elliote, note, $22.95; John Cook, $14.19; Margaret Urie, $44.00; Betsey Kemper, $11.75; Frederick S. Allen, $4.37½; Lewis Chesneau, $15.00; Prunell J. Reddish, $40.00; William Wilson, judgment, $42.80.—$1,694.38.

The above is a list of balances due the late firm of McMicken & Ficklin, *are* referred to in our report of this date.

MURDOCK McQUIEN,
WILLIAM LEAKE,
*Auditors.*

ST. FRANCISVILLE, 21*st Feb.*, 1831.

CHARLES McMICKEN,
vs.
JAMES J. WEEMS, curator of estate of Jas. H. Ficklin. } No. 108.

In this case we, the undersigned, Murdock McQuien and William Leake, having been appointed auditors (as will appear by a commission from the honorable court of probates hereunto annexed) to examine and report upon the accounts between the plaintiff and the estate of James H. Ficklin, under the firm of McMicken & Ficklin. In compliance therewith we have carefully examined the books and other vouchers of said accounts, and find, by their article of copartnership, their firm commenced on the ninth day of June, one thousand eight hundred and fifteen; that their books were opened on the sixth of November following; that during the existence of said firm their business was conducted and books kept under the notice of both said partners; that, by mutual consent, an article of dissolution was entered into on the eighth day of September, one thousand eight hundred and seventeen, by which Charles McMicken was charged with the settlement of all the business of their late firm, and with that view was put in possession of all their books, notes, and accounts then due to said firm; that James H. Ficklin became the purchaser of all their stock of goods then on hand, amounting to nine thousand seven hundred and thirty-three dollars eighty-seven cents; in payment of which he, the said J. H. Ficklin, gave two acceptances of Messrs. Flower & Finley, the first due on the first day of March, one thousand eight hundred and eighteen, for the sum of three thousand dollars; the second due on the first of May, in same year, for one thousand eight hundred sixty-six dollars ninety-three and a half cents; and also a joint note of James H. Ficklin, Jedediah Smith, and Amos Webb, made payable on first March, one thousand eight hundred and nineteen, for four thousand eight hundred sixty-six dollars ninety-three and a half cents; all of which payments, by James H. Ficklin, came into possession of Charles McMicken as other rights and credits of the late firm of McMicken and Ficklin; that the above specified acceptances were cashed and disposed of to the use of said firm; that the joint note of James H. Ficklin, Jedediah Smith, and Amos Webb, was, on the day of its maturity, charged on their books in account to Charles McMicken, and thereby became his individual property; that James H. Ficklin stands debited on the books of McMicken & Ficklin, in the sum of two thousand five hundred twenty-four dollars eighty-seven cents ($2,524 87) with interest from thirty-first March, one thousand eight hundred and nineteen, until thirty-first March, one thousand eight hundred and twenty-four, at 10 per cent.

per annum, is one thousand two hundred and fifty-six dollars seventy-five cents, ($1,256 75,) shewing the debits of James H. Ficklin to be three thousand seven hundred eighty-one dollars sixty-two cents, as per statement, ($3,781 62); that the debits of Charles McMicken for the same period is four thousand five hundred sixty-nine dollars twenty-eight cents, ($4,569 28;) interest for same period, at 10 per cent. per annum, is one thousand eight hundred sixty-four dollars ninety-one cents, ($1,864 91,) shewing his debits to be six thousand four hundred thirty-four dollars and nineteen cents, (6,434 19.) The credits of said Charles McMicken, for same period, is two thousand eight hundred and ninety-two dollars and thirty-eight cents, ($2,892 38,) with interest thereon, same period, at 10 per cent. per annum, is nine hundred seventy-seven dollars eighty-four cents, ($976 84,) shewing his credits to be three thousand eight hundred sixty-nine dollars twenty-two cents, (3,869 22;) the amount of credits taken from the debits shews the balance of his debits to be two thousand five hundred sixty-four dollars ninety-seven cents, ($2,564 97;) which amount, taken from the debits of James H. Ficklin, shews the excess of said Ficklin's debits to be one thousand two hundred sixteen dollars sixty-five cents, ($1,216 65;) which, being equally divided, shews the estate of James H. Ficklin indebted to Charles McMicken in open account six hundred and eight dollars thirty-two and a half cents, ($608 32½,) with interest thereon, at the rate of 10 per cent. per annum, from thirty-first March, one thousand eight hundred and twenty-four; and also by his joint note with Jedediah Smith and Amos Webb, as before stated, four thousand eight hundred and sixty-six dollars ninety-three and a half cents, with interest thereon, at the rate of 10 per cent. per annum, from first of March, one thousand eight hundred and nineteen; all of which, together with the balance-sheet, shewing the amount due on notes to said firm, to be one thousand six hundred and ninety-four dollars thirty-eight cents, and on open accounts to be two thousand two hundred and one dollars fifty-four cents, is respectfully submitted.

MURDOCK McQUIEN,
WM. LEAKE,
*Auditors.*

ST. FRANCISVILLE, 21*st February*, 1831.

Filed February 21st, 1831.

A. BELZONS, *Dep. Clerk.*

*Record.*

THE STATE OF LOUISIANA, *Parish of West Feliciana:*

At a session of the court of probates, began and held at the court-house in the town of St. Francisville, in and for the parish and State aforesaid, on the twentieth day of June, in the year of our Lord one thousand eight hundred and thirty-one, being the third Monday of said month of June:

Present, the hon. John B. Dawson, judge.

CHARLES MCMICKEN, vs. JAS. J. WEEMS, cur. } No. 108.

Ordered by the court that this cause be continued.

*Record.*

THE STATE OF LOUISIANA, *Parish of West Feliciana:*

At a session of the court of probates, began and held in and for the parish and State aforesaid, at the court-house of said parish, in the town of St. Francisville, on Monday, the 19th day of December, being the third Monday of said month, in the year of our Lord one thousand eight hundred and thirty-one:

Present, the hon. John B. Dawson, parish judge and ex officio judge of probates.

*Record.*

CHARLES MCMICKEN, vs. JAS. J. WEEMS, curator. } No. 108.

Ordered that the cause be set for trial on Tuesday, the 20th instant.

*Record.*

CHARLES MCMICKEN, vs. JAS J. WEEMS, curator.

The plaintiff in this case moves the court for a rule on the defendant, and on Robert Haile, of counsel for absent heirs, to shew cause, if any they have, in ten days, why the award of the arbitrators filed in this case should not be homologated; it is ordered, that the motion be allowed, and that the shewing be made.

I certify the above a true extract from the minutes of the court and copy of the motion and order, this 20th December, 1831.

B. COLLINS, *Clerk.*

Received Tuesday, the 20th December, 1831.

M. COURTNEY, *Sheriff.*

Served a copy of the within motion on James J. Weems, and one also on Robert Haile, in St. Francisville, December 26th, 1831.

JOHN PARKISON, *Dep. Sheriff.*

Filed 26th December, 1831.

J. MADISON, *Dep. Clerk.*

CHARLES MCMICKEN, vs. JAMES J. WEEMS, curator, and ROBERT HAILE, attorney for the absent heirs. } Probate court.

Robert Haile, attorney for the absent heirs of James H. Ficklin, dec'd, to a motion made to homologate the report made by the auditors in the above case, comes into court and opposes the homologation of the

same upon the following grounds: 1st. That this appearee never consented that the above case should be referred to auditors. 2d. That no notice was given to this appearee of the time and place where and when said auditors commenced their proceedings. 3d. That no legal evidence was adduced before the auditors, and upon which they could found such a report so drawn up. 4th. That they have decided a note given by James H. Ficklin, Amos Webb, and Jedediah Smith, to the firm of McMicken & Ficklin, to be the property of McMicken, from the books, as they say, of McMicken & Ficklin, when said books have, since the death of Ficklin, been in the possession of McMicken, and when various and numerous entries have been made on said books by McMicken himself, since the death of the said James H. Ficklin; insomuch as the said books now can operate as no evidence between the parties, unless the handwriting of the said James H. Ficklin, or his constituted clerk or agent, can be found.

ROBERT HAILE,
*Attorney for the absent heirs of James H. Ficklin, dec'd.*

Filed December 26, 1831.

B. COLLINS, *Clerk.*

*Defendant's opposition to homologation of awards of auditors.*

*State of Louisiana, parish of West Feliciana:*

CHARLES MCMICKEN
vs.
JAMES J. WEEMS, curator of James H. Ficklin.

In the court of probates, James J. Weems comes into court in his own proper person, and for opposition to the motion to homologate the report of the auditors in this case made says, that the said report ought not to be homologated for this, that there was no legal evidence before the auditors on which to found a report, or such a report as the one made up and presented; that said auditors were bound to proceed according to the strict rules of evidence, and the report was made up without legal evidence; and that said report was made up from ex parte evidence furnished by the plaintiff, Charles McMicken, consisting of commercial books, paper, and other documents, made up by Charles McMicken subsequent to the death of Jas. H. Ficklin.

Further opposer says, that there was no evidence before the auditors that a certain note, executed by James H. Ficklin, Amos Webb, and Jedediah Smith, in favor of the firm of McMicken & Ficklin, was the sole property of the plaintiff.

This opposer further says, that the auditors transcended the submission in this—they were to examine the accounts existing between the plaintiff and the late James H. Ficklin only, and they have taken into view a note given by James H. Ficklin, Amos Webb, and Jedediah Smith, to the firm of McMicken & Ficklin, which they were not au-

thorized to do. Wherefore, this opposer prays that said report may be set aside and the cause tried by the court.

JAMES J. WEEMS,
*Curator, &c., in proper person.*

Filed 2d January, 1832.

J. MADISON, *Dep. Clerk.*

*Record.*

*State of Louisiana, parish of West Feliciana:*

At a session of the court of probates, for the parish of West Feliciana, and State aforesaid, began and held at the court house of said parish, in the town of St. Francisville, on the sixteenth day of January, in the year of our Lord one thousand eight hundred and thirty-two:

Present, the honorable B. Dawson, parish judge of said parish, and ex-officio judge of the court of probates, presiding.

*Record.*

CHARLES MCMICKEN
vs.
JAS. J. WEEMS, curator. } No. 108.

Ordered, that the opposition filed to the homologation of the report and award of the arbitrators appointed in this case, be set for argument on Friday next, the 20th inst.

*Record.*

*Thursday, January 19th,* 1832.

CHARLES MCMICKEN
vs.
JAS. J. WEEMS, curator. } No. 108.

Ordered, that this cause be re-assigned for trial on Tuesday, the 24th instant.

*Record.*

*State of Louisiana, parish of West Feliciana:*

At a session of the court of probates for the parish of West Feliciana, and State aforesaid, began and held at the court-house of said parish, in the town of St. Francisville, on Monday, the nineteenth day of March, being the third Monday of said month of March, in the year of our Lord one thousand eight hundred and thirty-two:

Present, the Hon. John B. Dawson, parish judge of said parish, and ex-officio judge of the court of probates, presiding.

*Record.*

CHARLES MCMICKEN
vs.
JAS. J. WEEMS, curator. } No. 108.

Ordered, that this cause be set for trial on Friday, the 23d instant.

*Record.*

*Friday, March 23d, 1832.*

CHARLES MCMICKEN
vs.
JAS. J. WEEMS, curator. } No. 108.

This cause was called up for trial on the opposition of defendants to the homologation of the award of the auditors. After hearing the evidence and argument of counsel on the part of the curator, and counsel of the absent heirs, Amos Webb, and the heirs of Jedediah Smith, by counsel, moved for permission to oppose the homologation of the auditors' award by argument, which was opposed by plaintiff. The court ordered that the motion be allowed; and after hearing the argument of counsel, said Webb, and Smith's heirs in part, the plaintiff entered a non-suit as to the counsel of absent heirs, Robert Haile. After hearing the whole of the argument, the curator presented and filed his plea of prescription.

*Plea of Prescription.*

CHARLES MCMICKEN
vs.
JAMES J. WEEMS, curator of
Jas. H. Ficklin's succession.

*In the probate court, parish of West Feliciana:*

To the honorable judge of probates, holding court in and for the parish and State aforesaid.

For further answer to plaintiff's petition, the respondent in the above entitled suit answers and pleads prescription of one, three, and five years to the claim of plaintiff; and prays to be dismissed with costs, and for general relief.

JAS. J. WEEMS,
*Curator of Ficklin, in proper person.*

Filed March 23d, 1832.

B. COLLINS, *Clerk.*

*Testimony as taken down by the clerk.*

Probate court, parish West Feliciana.

C. MCMICKEN
vs.
J. J. WEEMS, cur. } No. 108.

Testimony taken down on the trial of the cause, March 23d, 1832, viz:

Plaintiff offers in evidence the original article of co-partnership between plaintiff and James H. Ficklin, marked A; as also a memorandum of the dissolution of the same, marked (B); and the note of James H. Ficklin, Jedediah Smith, and Amos Webb, in favor of McMicken & Ficklin, marked (C). The signatures of each were admitted—the

copies of the memorandum of dissolution of co-partnership and the note marked B and C are attached to the plaintiff's petition.

Plaintiff offered no other evidence than the above.

*Defendant's testimony, viz:*

William Leake, sworn on part of defendant, says, that in making up the report submitted by him, as referee, he did not examine any witnesses, but that he examined the mercantile books of McMicken & Ficklin, as they appeared to be from their face, to wit, the day book, journal, and ledger, also a memorandum book, in which the accounts of the parties were kept and entered on the other books monthly, as well as he thinks; that said memorandum book was in the handwriting of both parties; that he had no evidence of the handwriting in said memorandum book, but his own knowledge of their handwriting, and to which he was willing to have sworn; that the entries in the memorandum book were dated between the entering into partnership and its dissolution; that he does not think any entry was made after the date of dissolution; that he recognised entries in the commercial books in the handwriting of both parties, as also of clerks whose handwriting he does not know.

Cross-examined, says, that at the time of the examination of the books, the articles of co-partnership and dissolution, and the note of J. H. Ficklin, J. Smith, and A. Webb, to McMicken & Ficklin, now exhibited to him, were before him, it being the same note mentioned in his award.

Re-examined in chief, says, that in the commercial books he found entries made subsequently to the dissolution, in the handwriting of C. McMicken; finding, after the dissolution, that the books were placed in the possession of C. McMicken, he did, when he came to an entry thus made, trace it up to its origin, to see if it was correct, and in some instances found errors, and corrected them. There was, as discovered, a collection of a note or account, which he charged to plaintiff, it being a credit to an individual, which was not entered in the cash account; that errors, as discovered, are mentioned in the award as made by witness; that the error of the entry, as stated above, was in the handwriting of a Mr. Fort; that the books offered in evidence were found in the possession of C. McMicken, and were offered by him; that on the appointment, the parties (except R. Haile, the attorney for the absent heirs, who was not notified to the knowledge of witness) were notified of the day of meeting; they met, with the exception of said R. Haile, at the house of the plaintiff, waiving legal formalities of notice; the books were there presented by plaintiff, and the auditors met afterwards at the same place, from time to time, until the business was completed; that those books were kept in ordinary manner of commercial books, in double entry; that the entries as spoken of as made after the dissolution, were entries of settling accounts, collection of moneys, &c.; that he saw no original entries, except what grew out of the settlement of the books of the firm, and which were necessary in the settlement of the concern.

Evidence closed Mar. 23rd, 1832. B. COLLINS, *Clerk.*

Filed 23d March, 1832. J. MADISON, *Dep. Clerk.*

CHARLES McMICKEN
vs. } No. 108.
JAS. J. WEEMS, Cur.

*Probate Court, March 24th*, 1832.

Testimony, oral and documentary, as taken down by the clerk on the trial of this cause:

Plaintiff offered in evidence the renewal of letters of curatorship of Clark Woodruff, as curator of James H. Ficklin, deceased, evidenced by the production of probate record of date 23d May, 1823, marked (E); also the certificate of the parish judge, shewing that the letters of Woodruff, as curator, were not renewed after that date, (F); also the petition of Amos Webb, asking for letters of curatorship on the estate of Ficklin, 14th Feb'y, 1825, (G); also the petition and order of court, appointing Jas. J. Weems curator of Ficklin's estate, with the letters of date, Feb'y 9th, 1829, (H); also petition and order, renewal of the letters of Weems as curator, dated 11th March, 1830, (I); also the appointment and letters of Jas. J. Weems, as syndic of the estate of Ficklin, in 1828, (J); also the record suit in the court of probates, McMicken vs. Jas. J. Weems, syndic of Ficklin's estate; to this testimony defendant objected; objection overruled; bill of exceptions taken. Also suit, petition, citation, copy of note and judgment, Charles McMicken vs. Ira Smith and wife, No. 636, dist. court; also the exceptions and answer in the same; also a commission, and interrogatories and cross-interrogatories thereto attached, issued from the district court of the United States for the eastern district of Louisiana, at the suit of Charles McMicken vs. Amos Webb, for the purpose of proving that such a suit did exist; also the acknowleged answers of Jas. J. Weems to the interrogatories and cross-interrogatories aforesaid; also, to shew the existence of the said suit—

James M. Bradford, a witness on the part of plaintiff, sworn, says: That he, as a justice of the peace, executed a commission issued from the district court of the United States, at the suit of McMicken vs. Webb, in the year 1829.

The court then adjourned until Monday next, the 26th instant.

*Monday, 26th March*, 1832.

The court met pursuant to adjournment.

It is admitted that Mary Ann Gray, wife of Ira Smith, one of the defendants in the suit of C. McMicken vs. Ira Smith and wife, took possession of the estate of Jedediah Smith, her former husband, deceased, without the benefit of inventory.

Here the testimony closed. J. MADISON, *Dep. Clerk.*
Filed 26th March, 1832. J. MADISON, *Dep. Clerk.*

*Record.*

CHARLES McMICKEN
vs. } No. 108.
JAS. J. WEEMS, Cur.

*Saturday, March 24th*, 1832.

The further trial of this cause was this day called up; after hearing the testimony in part, the cause was then laid over until Monday morning next, the 26th inst.

*Record.*

CHARLES MCMICKEN
vs.
JAS. J. WEEMS, Curt. } No. 108.—March 26th, 1832.

The trial of this cause was this day resumed; after hearing the whole of the testimony, and the argument of counsel, the court then took the case under advisement.

*Record.*

CHARLES MCMICKEN
vs.
JAS. J. WEEMS, Curt. } No. 108.—March 27th, 1832.

In this case the court this day delivered its opinion, which was as follows, viz:

In this case auditors were appointed by counsel of parties to report on the partnership accounts of the partnership formerly existing between the plaintiff and J. H. Ficklin, deceased, whose estate is represented by the defendant; the auditors made their report, and the subject now before the court is the motion to homologate this report, made by the plaintiff, and opposed by the defendant and the counsel of absent heirs; it is objected to this report, that the counsel of absent heirs was not duly notified of the time and place of meeting of the auditors; this is true, but this suit, in the opinion of the court, would have been well brought, without making him a party defendant. Suits against vacant estates are brought against the curator of such estates, *C. of Practice, art.* 122; and the plaintiff having entered a non suit as to the counsel of absent heirs, the cause is in the same situation it would have been if he had not been made a party originally. It is further objected to this report, that the auditors acted on insufficient and illegal evidence. The auditors were appointed to examine and report on the books, papers, and accounts of the partnership of McMicken and Ficklin; the defendant was duly notified, but failing to attend, the auditors acted on such evidence as was presented to them; and it is now too late to object to the evidence on which they acted, after the judgment (for such an award is substantially a judgment) has been rendered, even if it were not perfectly legal evidence; the court is however of opinion, that the evidence before the auditors was legal. It (the partnership, books, and papers) was the very object they were appointed to examine, and they could not act at all without acting on this evidence. After the argument on the merits of the motion was closed, a plea of prescription was filed by the defendant, and has been argued at great length by the counsel of both parties; the court is disposed to sustain the principles contended for by the plaintiff's counsel; the question appears, however, from an authority not referred to by either of the counsel, to be no longer open.

The supreme court have settled it. They have decided, that as one partner cannot sue his co-partner in a direct action, so prescription does not run against either partner; Bandock vs. Lament, 2d La. Rep. It is therefore ordered, adjudged, and decreed, that the report of the au-

ditors be homologated, and that the plaintiff recover of the defendant the sum of five thousand four hundred and seventy-five dollars 26 [cents], with interest at the rate of ten per cent. per annum, on four thousand eight hundred and sixty-six dollars 93½ [cents], (the note,) from the 1st of March, 1819, until paid; and five per cent. per annum, on six hundred and eight dollars 82½ [cents], (amount of the open account,) the plaintiff remitting the balance of the interest allowed on this account, from the 31st of March, 1824, until paid; and that the defendant pay the costs of this suit.

On motion of the plaintiff, it is ordered by the court that he have leave to withdraw the following original papers, filed by him in this suit, upon leaving certified copies thereof in their stead, viz, the articles of co-partnership, and of the dissolution, between plaintiff and James H. Ficklin, Jedediah Smith, and Amos Webb.

*Plaintiff's Exceptions.*

*Court of Probates, parish of West Feliciana:*

C. McMicken
vs.
J. J. Weems, Curator.

Be it remembered, that in this case, on the motion to homologate the report of the auditors, and after the evidence was closed, and the cause had been argued by the counsel of the plaintiffs and defendant, and the argument closed after dark in the evening of the 23rd of March, 1832, the defendant filed his plea of prescription against the demand of the plaintiff. On the next day the cause was again called up, and the plaintiff permitted to introduce evidence to shew the interruption of prescription against his demand. The plaintiff, with other evidence, propounded this question to the witness Lobdell: "Were not you and your partner, C. Watts, esquire, in the year 1828 or 1829, or about that time, engaged to defend a suit brought in the federal court in New Orleans by C. McMicken, the plaintiff in this suit, on the note given by Ficklin, Webb, and Smith, which is mentioned in the petition, and is one of the objects of this suit, against Webb, or was not such a suit brought about that time?" To this question the witness answered in the affirmative. The defendant objected to this evidence, on the ground that it was not the best evidence which the nature of the case admits of, but that the record of the suit from the U. S. court ought to be produced. The plaintiff counsel contended, although the general rule was unquestionable, yet that it only required of parties to produce the best evidence which the nature of the case permitted, under all the circumstances, and which it was "then" in their power to produce; and as the plaintiff had no notice until the evening before, that the plea of prescription would be filed, and it was then impossible to send to N. Orleans and obtain the record in time. And he further argued, that the reason of the rule did not apply in this case, inasmuch as it was evident the plaintiff could have no fraudulent design, withholding the record, when he wished to take the evidence of a person who was one of the counsel of

the defendant in the suit in the U. S. court, and one of the counsel of the same Webb employed, with others, to argue this cause in behalf of the defendant, in consequence of the identity of interest of the defendant and of Webb, in defending the suit on the note. The court, however, sustained the objection, and refused to permit the evidence to be introduced. To this opinion of the court, sustaining this objection, the plaintiff by his counsel excepts, and tenders this his bill, and prays that it may be signed, and it is signed accordingly. The defendant agreed at the time to continue the case, to allow plaintiff time to procure the suit mentioned in the federal court.

JOHN B. DAWSON,
*Parish Judge.*

Filed 26th March, 1832. J. MADISON, *Dep. Clerk.*

*Remission of interest.*

C. McMICKEN
vs.
J. J. WEEMS, Curator.

The plaintiff remits one-half the interest allowed by the auditors on the open account mentioned in their award in this case, and claims jugdment for only five per cent. on said account, from the time mentioned in the award.

DOWNS,
*Attorney for plaintiff.*

Filed 27th March, 1832.

J. MADISON, *Dep. clerk.*

*Record.—Judgment assigned by the judge.*

CHARLES McMICKEN,
vs.
JAS. J. WEEMS, Curator.

In this case the court this day delivered its opinion, which was as follows, viz: In this case auditors were appointed by counsel of parties to report on the partnership accounts of the partnership formerly existing between the plaintiff and J. H. Ficklin, deceased, whose estate is represented by the defendant. The auditors made their report, and the subject now before the court is the motion to homologate this report, made by the plaintiff, and opposed by the defendant and the counsel of *absent heirs*. It is objected to this report, that the counsel of absent heirs was not duly notified of the time and place of meeting of the auditors. This is true, but this suit, in the opinion of the court, would have been well brought without making himself a party defendant; suits against vacant estates are brought against the curator of such estates—*C. of Practice, art.* 122; and the plaintiff having entered a non-suit as to the counsel of absent heirs, the cause is in the same situation it would have been if he had not been made a party originally.

It is further objected to this report, that the auditors acted on insufficient and illegal evidence; the auditors were appointed to examine and

report on the books, papers, and accounts of the partnership of McMicken & Ficklin; the defendant was duly notified, but failing to attend, the auditors acted on such evidence as was presented to them; and it is now too late to object to the evidence on which they acted after the judgment (for such an award is substantially a judgment) has been rendered, even if it were not perfectly legal evidence; the court is, however, of opinion, that the evidence before the auditors was legal. It (the partnership, books and papers,) was the very object they were appointed to examine, and they could not act at all without acting on this evidence. After the argument on the merits of the motion was closed, a plea of prescription was filed by the defendant, and has been argued at great length by the counsel of both parties. The court is disposed to sustain the principles contended for by the plaintiff's counsel; the question appears, however, from an authority not referred to by either of the counsel, to be no longer open, the supreme court have settled it; they have decided, that as one partner cannot sue his copartner in a direct action, so prescription does not run against either partner. Bandock vs. Lawent, 2 La. Rep."

It is therefore ordered, adjudged, and decreed, that the report of the auditors be homologated, and that the plaintiff recover of the defendant the sum of five thousand four hundred and seventy-five 26-100 dollars, with interest at the rate of ten per cent. per annum on four thousand eight hundred and sixty-six 93½-100 dollars, (the note,) from the first of March, 1819, until paid; and five per cent. per annum on six hundred and eight 82½-100 dollars, (amount of the open account,) the plaintiff remitting the balance of the interest allowed on this account from the 31st of March, 1824, until paid, and that the defendants pay the costs of this suit.

JOHN B. DAWSON, *Parish judge.*

March 27th, 1832.

*Motion for a new trial by defendant.*

CHARLES MCMICKEN
vs.
JAS. J. WEEMS, curator of the estate of Jas. H. Ficklin, deceased.

In the probate court, West Feliciana, State of Louisiana, and remembered on the docket of said court by No. 108, the defendant in the above entitled suit comes into court in his own proper person, and moves the court for a new trial, on the following grounds, to wit: Because the judgment of the court appears clearly contrary to law and evidence.

JAS. J. WEEMS,
*Defendant, in proper person.*

Filed 30th March, 1832. J. MADISON, *Dep. clerk.*

*Petition of appeal.*

To the honorable the parish judge, and ex-officio judge of probates, in and for the parish of West Feliciana, State of Louisiana; the petition of Robert Haile, attorney for the absent heirs of James H. Ficklin, respectfully shows:

That a final judgment has been rendered in this honorable court, in which Charles McMicken was plaintiff, and James J. Weems, curator, is defendant; your petitioner represents error to be in said judgment, and the amount in controversy being over three hundred dollars, wherefore your petitioner prays that your honor will allow an appeal to the Supreme Court, to be made returnable conformably to law.

ROBERT HAILE, *Att'y for the absent heirs of Jas. H. Ficklin, deceased.*

Let an appeal be allowed, returnable to the supreme court for the western district, to be holden in the town of Baton Rouge on the first Monday in August next, conditioned that petitioner give bond and security in the sum of one hundred dollars.

June 1st, 1832. JOHN B. DAWSON, *Parish judge.*

Filed June 23rd, 1832.

B. COLLINS, *Clerk.*

*Appeal bond.*

The State of Louisiana to Charles McMicken, greeting:

Whereas Robert Haile, attorney for the absent heirs of James H. Ficklin, this day filed in the office of the clerk of the probate court, parish of West Feliciana, a petition of appeal from a final judgment rendered in said court of the said parish against him, which appeal is returnable in the supreme court of this State for the eastern division, sitting in Baton Rouge, on the first Monday of August next, 1832. You are, therefore, hereby cited to appear in person, or by attorney, in said court, on the day last aforesaid, to answer to the said appeal, this 23rd day of June, 1832.

Witness: B. COLLINS, *Clerk of said court.*

Executed 12th July, 1832, by delivering a copy of this citation of appeal, and a certified copy of petition of appeal, to S. W. Downs, esq., attorney for C. McMicken; C. McMicken being out of the State of Louisiana, in St. Francisville.

J. PARKISON, *Dep. sheriff.*

STATE OF LOUISIANA, *Parish of West Feliciana:*

Know all men by these presents that we, Robert Haile, as principal, and John L. Lobdell, as security, are held and firmly bound unto Charles McMicken, his heirs, executors, administrators, curators, and assigns, in the sum of one hundred dollars; and for the payment hereof, we bind ourselves, our heirs, executors, administrators, and curators, firmly by these presents. Sealed with our seals, and dated this 23rd day of June, 1832.

Whereas the above bounden Robert Haile, attorney for the absent heirs of James H. Ficklin, hath filed their petition of appeal from a final judgment rendered against them in the probate court in and for the parish aforesaid, in favor of the aforesaid Charles McMicken.

Now, therefore, the conditions of the above obligation *is* such, that if the said Robert Haile, as aforesaid, shall prosecute the said appeal with effect, or shall pay or perform such judgment that may be rendered thereon against him as such; or if the execution that may issue, or such judgment, shall be satisfied out of his proper goods or chattels, lands or tenements, rights or credits, then, and in such case, the above obligation shall be null and void, or to remain in full force and virtue.

ROB'T HAILE, [SEAL.]
JOHN L. LOBDELL. [SEAL.]

Witness: B. COLLINS.

Filed June 23rd, 1832.

B. COLLINS, *Clerk.*

To the honorable John B. Dawson, parish judge and ex-officio judge of probates in and for the parish of West Feliciana; the petition of James J. Weems, curator of the vacant succession of James H. Ficklin, deceased, respectfully shows:

That a final judgment was rendered by your honor in the court aforesaid, on the 27th day of March, in the year 1832, in favor of one Charles McMicken, against this petitioner in his capacity aforesaid, for the sum of five thousand four hundred and seventy-five dollars and twenty-six cents, besides interest.

Further shews, that this the above petitioner believes himself to have been aggrieved by the said judgment, and wishes to appeal from the same, and offers to give such security as your honor may direct; wherefore he prays your honor to allow him to appeal from said judgment.

JAS. J. WEEMS,
*Curator, in proper person.*

Let an appeal issue as prayed in the above petition, on petitioner and appellant giving bond and security in the sum of one hundred dollars, conditioned according to law, returnable to the supreme court, sitting in East Baton Rouge, on the first Monday of August next.

JOHN B. DAWSON, *Parish judge.*

Filed July 11th, 1832.

B. COLLINS, *Clerk.*

The State of Louisiana to Charles McMicken, greeting:

Whereas Jas. J. Weems, curator of the vacant estate of Jas. H. Ficklin, hath this day filed in the office of the clerk of the probate court, parish of West Feliciana, a petition of an appeal from a final judgment rendered in said court of the said parish against him, which appeal is returnable in the supreme court sitting in Baton Rouge, on the first Monday of August next, 1832. You are, therefore, hereby cited to attend in person, or by attorney, in the said court on the day last aforesaid, to answer to said appeal, this 11th day of July, 1832.

Witness:

B. COLLINS,
*Clerk of said court.*

Executed 12th July, 1832, by delivering a copy of this citation of appeal, and a certified copy of petition of appeal, to S. W. Downs, esq., attorney for C. McMicken, he, McMicken, being out of the State of Louisiana, in St. Francisville.

J. N. PARKISON, *Dep. sheriff.*

STATE OF LOUISIANA, *Parish of West Feliciana:*

Know all men by these presents, that we, James J. Weems, as principal, and William H. Foulds, as security, are held and firmly bound unto Charles McMicken, his heirs, executors, administrators, curators, and assigns, in the sum of one hundred dollars; and for the payment hereof, we bind ourselves, our heirs, executors, administrators, and curators, firmly by these presents. Sealed with our seals, and dated this 11th day of July, 1832.

Whereas the above bounden James J. Weems, as curator of estate of J. H. Ficklin, hath this day filed his petition of appeal from a final judgment rendered against him in the probate court, in and for the parish aforesaid, in favor of the aforesaid Charles McMicken.

Now, therefore, the condition of the above obligation is such, that if the said James J. Weems shall prosecute his said appeal with effect, or pay or perform such judgment that may be rendered thereon against him; or if the execution that may issue, or such judgment, shall be satisfied out of his proper goods or chattels, lands or tenements, rights or credits, then, and in such case, the above obligation shall be null and void, or else to remain in full force and virtue.

JAS. J. WEEMS, curator of Ficklin, [SEAL.]
WM. H. FOULDS. [SEAL.]

Witness: B. COLLINS.

Filed July 11th, 1832.

B. COLLINS, *Clerk.*

STATE OF LOUISIANA, *Parish of West Feliciana:*

At a session of the court of probates, began and held in and for the parish and State aforesaid, at the court-house, in the town of St. Francisville, in said parish, on the sixth day of October, being the first Monday of said month, in the year of our Lord one thousand eight hundred and thirty-four:

Present the honorable John B. Dawson, judge of said court.

CHARLES MCMICKEN, appellee,
vs.
JAMES J. WEEMS, appellant.
} No. 108.—October 7, 1834.

In this case, on motion of James J. Weems, appellant, and upon exhibiting to the court the decree of the Supreme Court rendered on an appeal in this case, it is ordered that the said decree be spread upon the minutes of the court; further ordered, that the cause be put upon the trial docket of this court.

*Supreme court, western district, State of Louisiana,*
*parish of West Feliciana.*
*Monday August* 11, 1834.

Present the honorable George Matthews.
Present the honorable F. X. Martin.
Present the honorable Henry A. Bullard.
On this day the court delivered their decision in this case, following:

C. McMicken, appellee,
vs.
J. J. Weems, appellant. } No. 108.

Appeal from the court of probates of the parish of West Feliciana.

The curator is appellant from a judgment against him on a plea of prescription; the plaintiff urges, the court below did not err as he interrupted the prescription by a suit. The suit alluded to by the plaintiff is alluded to, indeed, in the record of that before us, but as the transcript of it makes no part of the record under our eyes, we are unable to ascertain whether the prescription was really interrupted; and, as the best consideration we are able to give to the case, it appears to us justice requires the remanding of it, in order to afford to the plaintiff to shew that the prescription was interrupted.

It therefore ordered, adjudged, and decreed, that the judgment be annulled, avoided, and reversed, and the case remanded for a new trial, the appellee paying costs in this court.

I certify the foregoing to be a true copy of the original decision on record in my office.

In testimony whereof I grant these presents, under my hand and seal of the court at Baton Rouge, this fifteenth day of August, one thousand eight hundred and thirty-four.

(Signed) A. H. LEGENDRE, *Clerk.*

State of Louisiana, *Parish of West Feliciana:*

At a session of the court of [probates,] began and held in and for the parish and State aforesaid, at the court-house of said parish, in the town of St. Francisville, on Monday the sixth day of April, being the first Monday of said month, in the year of our Lord one thousand eight hundred and thirty-five:

Present the honorable John B. Dawson, parish judge, and ex-officio judge of the court of probates.

Charles McMicken,
vs.
Jas. J. Weems, curator. } No. 108.—Ordered to be continued.

State of Louisiana, *Parish of West Feliciana:*

At a session of the court of probates, began and held in and for the parish and State aforesaid, at the court-house of said parish, in the town of St. Francisville, on Monday the sixth day of July, in the year of our Lord one thousand eight hundred and thirty-five:

Present the honorable John B. Dawson, parish judge and ex-officio judge of the court of probates.

CHARLES MCMICKEN, vs. JAS. J. WEEMS, curator. } No. 108.

Set for Saturday 10th instant.

CHARLES MCMICKEN, vs. JAS. J. WEEMS, curator. } No. 108.

By consent, it is ordered that this cause be re-set for trial for the 16th instant.

CHARLES MCMICKEN, vs. JAS. J. WEEMS, curator. } No. 108.—July 16, 1835.

This cause was called up for trial, when the parties of counsel agreed to use the testimony as taken down by the clerk on the former trial, March 23d, 1832; and, after hearing the whole of the evidence, the cause was submitted and taken under consideration.

CHARLES MCMICKEN, vs. JAS. J. WEEMS, curator of Ficklin. } No. 108.—July 23, 1835.

The court this day delivered its opinion as follows, viz:

This cause has been remanded from the supreme court to allow the plaintiff an opportunity of shewing that prescription was interrupted; the cause was taken up and tried on the pleadings and evidence as formerly adduced, with some additional testimony; the court sees no cause for changing its former opinion, the law and evidence being in favor of the plaintiff. It is therefore ordered, adjudged, and decreed, that the report of the auditors be homologated, and that the plaintiff recover of the defendant the sum of five thousand four hundred and seventy-five dollars and twenty-six cents, with ten per cent. interest per annum on the sum of four thousand eight hundred and sixty-six dollars ninety-three and a half cents, (the note,) from the first day of March, 1819, until paid; and five per cent. interest per annum on six hundred and eight dollars thirty-two and a half cents, (the account;) plaintiff remitting the balance of the interest allowed on the open account, from the 31st March, 1824, until paid; and that the defendant pay the cost of suit.

CHARLES MCMICKEN, vs. JAS. J. WEEMS, curator. } No. 108.

*Probate court, July* 16, 1835.

The parties agreeing to use the foregoing, to wit, the former testimony, when plaintiff offered and read in addition the suit instituted in the federal court in the State of Louisiana, eastern district of , Charles McMicken vs. Amos Webb, filed May 1st, 1827, No. 2,404: also

the copy of petition, note, and citation in suit, Charles McMicken vs. Mary Ann Smith and husband, in third district court, parish of West Feliciana, Louisiana, No. 636, filed December 5th, 1825.

Plaintiff closed. Defendant offered none.

Testimony closed July 16, 1835.

B. COLLINS, *Clerk*.

Filed July 16, 1835.

B. COLLINS, *Clerk*.

F.—Documentary evidence as used on the trial of this cause.

STATE OF LOUISIANA, *Parish of West Feliciana:*

*Court of Probates, May 23d*, 1823.

Then came into court Clark Woodruff, and filed his petition, praying a continuance of his letters of curatorship upon the vacant succession of James H. Ficklin, deceased, and also filed his bond; and the court being satisfied that the continuance is necessary to a settlement of said estate, it is ordered that the letters of curatorship heretofore granted to the said Clark Woodruff, upon the vacant succession of the said James H. Ficklin, deceased, be continued for one year from the date hereof, according to the act of Assembly, approved on the twenty-second day of February, one thousand eight hundred and seventeen.

H. W. HILL, *Parish Judge*.

STATE OF LOUISIANA, *Parish of West Feliciana:*

I certify that the letters of C. Woodruff, as curator of the estate of James H. Ficklin, were not renewed after the date of the above, and that the foregoing is a true copy from the original, as appears of record in my office, in Probate Record Book D, on page 296.

Given under my signature and seal official this 8th day of March, 1833.

JOHN B. DAWSON, *Parish Judge*.

Filed March 8th, 1833.

B. COLLINS, *Clerk*.

G.

STATE OF LOUISIANA, *Parish of West Feliciana:*

*Court of Probates, 14th February*, 1825.

Then came into open court Amos Webb, by his attorney J. Turner, and filed his petition, which is as follows:

To the honorable judge of the parish of West Feliciana, in the State of Louisiana, and ex officio judge of probates in the same:

The petition of Amos Webb, of the parish of Point Coupee, respectfully sheweth: that James H. Ficklin, formerly of the parish first aforesaid, departed this life several years past; state that his executors, Andrew Skilman and J. Smith, did not settle his estate; that his[?] Thos. Walker and C. Woodruff, who have successively had the curatorship of his estate, have not settled the same.

That your petitioner was the security of James H. Ficklin, in his lifetime, upon a note for the sum of $4,866 93¾.

That your petitioner is therefore interested in having the said succession settled; that C. Woodruff, who was last curator, has had the appointment for several years, and has suffered his time to elapse without settling said estate, or rendering his accounts.

Your petitioner, therefore, prays your honor that he may be appointed curator to said succession, which is now vacant, and that every legal means for that purpose be taken; and will ever pray.

J. TURNER, *Attorney for petitioner.*

Let the usual notices of this application be given. 21st February, 1825.

THOS. M. CHINN, *Parish Judge.*

STATE OF LOUISIANA, *Parish of West Feliciana:*

I certify the foregoing to be a true copy from the original, as appears of record in my office, in Probate Record Book "A," page 112.

Given under my signature and seal official, this 8th day of March, 1833.

JOHN B. DAWSON, *Parish Judge.*

Filed March 8th, 1833.

B. COLLINS, *Clerk.*

H.

STATE OF LOUISIANA, *Parish of West Feliciana:*

To the honorable parish judge and ex-officio judge of probates in and for the above Parish and State:

The petition of James J. Weems, of said parish and State, shews, that one James H. Ficklin lately died, leaving a large succession in said parish and State, and that the said succession is a vacant succession. Wherefore this petitioner prays your honor to grant him letters of curatorship on the said vacant succession of the said James H. Ficklin, deceased; and he will ever pray.

JAS. J. WEEMS.

Filed 9th , 1829.

JOHN B. DAWSON, *Parish Judge.*

Let notices be given of this application as the law directs, and, unless legal opposition is made, let the prayer of the petitioner be granted in due form of law.

JOHN B. DAWSON, *Parish Judge.*

February 9th, 1829.

STATE OF LOUISIANA, *Parish of West Feliciana:*

Court of Probates.

John B. Dawson, parish judge and ex officio judge of the court of probates in and for the same, to all who may see these presents:

"Know ye" that James J. Weems, having appeared in this court and complied with the formalities of the law to entitle him to letters of

curatorship on the estate of James H. Ficklin, deceased, and it appearing to the satisfaction of the court that he is a fit and proper person to be entrusted with said letters, therefore I, John B. Dawson, judge as aforesaid, do hereby grant to the said James J. Weems letters of curatorship as aforesaid.

Given under my hand and seal official this 9th day of March, anno domini 1829.

JOHN B. DAWSON, *Parish Judge.*

STATE OF LOUISIANA, *Parish of West Feliciana:*

I certify the foregoing to be a true copy from the original, as appears of record in my office in probate record "H," on pages 53 and 54, and probate record "G," page 330.

Given under my signature and seal official this 8th day of March, 1833.

JOHN B. DAWSON, *Parish Judge.*

Filed March 8th, 1833.

B. COLLINS, *Clerk.*

I.

STATE OF LOUISIANA, *Parish of West Feliciana:*

To the honorable John B. Dawson, parish judge and ex-officio judge of probates in and for the parish and State aforesaid:

The petition of James J. Weems, of the parish and State aforesaid, respectfully shows, that, on the 9th day of March, 1829, this petitioner was appointed curator of the estate of James H. Ficklin, which was then and is now a vacant succession, and that twelve months have elapsed since his appointment; he therefore prays that he may be re-appointed curator of the succession aforesaid.

JAMES J. WEEMS.

Petition filed March 11th, 1830.

JOHN B. DAWSON, *Parish Judge.*

Let the prayer of the petitioner be granted, and let his letters of curatorship be renewed for the period of twelve months from this date, upon his giving bond as the law directs, &c.

JOHN B. DAWSON, *Parish Judge.*

March 11th, 1830.

STATE OF LOUISIANA, *Parish of West Feliciana:*

Court of Probates.

John B. Dawson, parish judge, and ex-officio judge of the court of probates in and for the same, to all who may see these presents:

"Know ye" that James J. Weems having appeared in this court, and complied with the formalities of the law, to entitle him to a renewal of his letters of curatorship to the estate of James H. Ficklin, deceased, and it appearing to the satisfaction of the court that he is a fit and proper person to be entrused with said letters, therefore I, John B.

Dawson, judge as aforesaid, do hereby grant to the said James J. Weems letters of curatorship as aforesaid.

Given under my hand and seal official this 11th March, anno domini 1830.

JOHN B. DAWSON, *Parish Judge.*

STATE OF LOUISIANA, *Parish of West Feliciana:*

I certify the foregoing to be a true copy from the original, as appears of record in my office, in Probate Record "H," on pages 142 and 150.

Given under my signature and seal official this 8th day of March, 1833.

JOHN B. DAWSON, *Parish Judge.*

Filed March 8th, 1833.

B. COLLINS, *Clerk.*

J.

STATE OF LOUISIANA, *Parish of West Feliciana:*

Court of Probates.

John B. Dawson, parish judge, and ex-officio judge of the court of probates in and for the same, to all who may see these presents:

"Know ye" that James J. Weems having been duly elected syndic of the estate of James H. Ficklin, deceased, by the creditors of said succession, and it appearing to the satisfaction of the court that he is a fit and proper person to be entrusted with the same, therefore I, John B. Dawson, as aforesaid, do, by these presents, grant to him letters of syndicship aforesaid.

Given under my hand and seal official, April 25th, 1828.

JOHN B. DAWSON, *Parish Judge.*

STATE OF LOUISIANA, *Parish of West Feliciana:*

I certify the foregoing to be a true copy from the original, as appears of record in my office, in Probate Record G, page 119.

Given under my signature and seal official this 8th day of March, 1833.

JOHN B. DAWSON, *Parish Judge.*

Filed March 8th, 1833.

B. COLLINS, *Clerk.*

*Petition filed May 1st*, 1827.

To the honorable district court of the United States for the eastern district of the State of Louisiana.

The petition of Charles McMicken respectfully shows, that your petitioner is a citizen of the State of Pennsylvania, and resides in Philadelphia in said State; that some time in the year one thousand eight hundred and fifteen, your petitioner and James H. Ficklin formed a partnership and did business in the parish of Feliciana, in the State of Louisiana, under the firm and style of McMicken & Ficklin; that on the eighth day of September, one thousand eight hundred and seven-

teen, said partnership was dissolved by mutual consent; that at the time of the dissolution there was a quantity of stock of merchandise upon hand, which said Ficklin took and purchased, at an advance of five per cent. on the cost; and for the payment of one-half of said goods and stock, he caused to be executed and delivered to your petitioner, a promissory note or obligation in writing, dated September twentieth, one thousand eight hundred and seventeen, payable on the 1st day of March, one thousand eight hundred and nineteen, to the order of McMicken & Ficklin, for the sum of four thousand eight hundred and sixty-six dollars ninety-three and one-half cents, which note was made and subscribed by James H. Ficklin, Jed., that is Jedediah, Smith, and Amos Webb, on said 20th day of September, 1817; that by said note said drawers promised, jointly and separately, to pay said sum of four thousand eight hundred and sixty-six dollars ninety-three and one-half cents, with ten per cent. interest after due until paid, as appears from said note, a true copy of which is annexed to this petition, whereby each of them became bound, in solido, to pay the whole amount of said note.

Your petitioner further shews, that although said obligation was made payable to McMicken & Ficklin, after the dissolution of the said partnership, yet the same was contracted to, and in behalf of, your petitioner, their joint name being used and intended for his sole use and benefit, said Ficklin being in no wise a party thereto, except as one of the obligors.

Your petitioner further shews, that since the execution of said note, said James H. Ficklin and Jed. or Jedediah Smith, have departed this life; that said Amos Webb is living, and is a citizen of the State of Louisiana, residing in the eastern district of the said State, in the parish of Point Coupee, and is bound to pay the whole amount of said note, together with interest, according to the tenor thereof, but neglects and refuses to pay the same, although often amicably demanded.

Wherefore, your petitioner respectfully prays, that said Amos Webb may be cited to appear and answer this petition; that, after due proceedings, he may be condemned to pay to your petitioner the said sum of four thousand eight hundred and sixty-six dollars ninety-three and a half cents, with ten per cent. interest, according to the tenor of said note, from the first day of March, 1819, until paid, and costs of this suit. That said Amos Webb may be held to bail, and that all such other relief may be afforded your petitioner, as the nature of his case may require.

And as in duty, &c.

(Signed) ISAAC T. PRESTON,
*Attorney for Petitioner.*

*Copy of the note.*

ST. FRANCISVILLE, *September 20th*, 1817.

Dollars 4,866 93½.

On the first day of March, 1819, we, or either of us, promise to pay, jointly or separately, unto McMicken & Ficklin, or order, four thousand

eight hundred and sixty-six dollars ninety-three and a half cents, being for value received, with ten per cent. after due until paid.

(Signed) JAMES H. FICKLIN,
" JED. SMITH,
" AMOS WEBB.

Charles McMicken, the petitioner, being duly sworn, doth depose and say, that the defendant, Amos Webb, is really and truly indebted to him in the sum of four thousand eight hundred and sixty-six dollars ninety-three and one-half cents, with 10 per cent. interest from the first day of March, one thousand eight hundred and nineteen.

(Signed) C. McMICKEN.

Sworn to before me, this 1st of March, 1827.

(Signed) S. H. HARPER, *Clerk*.

In the absence of the judge, let the defendant be held to bail in ten thousand dollars.

(Signed) F. M. LEA, *Deputy Clerk*.

*Writ of bail.*

*District court of the United States,*
*for the eastern district of Louisiana:*

The President of the United States to the marshal of the eastern district of Louisiana, or his lawful deputy, greeting:

You are hereby commanded to take the body of Amos Webb, so that he be and appear at the district court of the United States for the eastern district of Louisiana, to be holden in the city of New Orleans, on the third Monday of May instant, to answer to the complaint of Charles McMicken, and that he do file his defence or answer with the clerk of said court on or before the same, or judgment will be given against him by default; and have you then and there this writ.

Witness the honorable T. B. Robertson, judge of said court, at the city of New Orleans, this 1st day of May, 1827, and 51st year of the independence of the United States.

(Signed) F. M. LEA, *Deputy Clerk*.

*Cour de district des Etats Unis,*
*Pour le district oriental de la Louisiane:*

Le President des Etats Unis au maréchal du district oriental de la Louisiane, ou a son deputé dument autorise, salut:

Vous etes commandé d'arreter le corps de Amos Webb pour qu'il dit á comparaitre a la cour de district des Etats Unis pour le district oriental de la Louisiane, qui sugera dans la ville de la Nouvelle Orléans le 3ieme Lundi de Mai inst., a l'affet de repond*e* a la plainte de Charles McMicken, et d'y remettre reponse ou defense au greffier de la dite cour avant ou le meme jour, faute de quoi jugement par defaut sera rendu contre lui, et vous feres votre rapport de cette ordré.

Temoin l'honorable T. B. Robertson, juge de la dite cour a la ville de la Nouvelle Orléans, ce 1riere jour de Mai, 1827, et la 51eme *dimé* de l'independence des Etats Unis.

(Signé) T. M. LEA, *Deputé Greffier*.

*Marshal's return.*

Received this writ on *on* the 5th day of May, 1827; served a copy of petition and copy of this writ upon Amos Webb on the seventh day of same month, 1827, by leaving the same at defendant's domicil, in the hands of Robert McLin, a resident at defendant's house, defendant being absent and out of the district.

(Signed) T. N. CHAMBERS, *D'y Marshal.*

Returned 16th May, 1827.

(Signed) J. NICHOLSON, *U. S. Marshal.*

And afterwards, to wit, on the same day was issued the following writ of bail:

*District court of the United States,*
*For the eastern district of Louisiana:*

The President of the United States to the marshal of the eastern district of Louisiana, or his lawful deputy, greeting:

You are hereby commanded to take the body of Amos Webb, so that he be and appear at the district court of the United States for the eastern district of Louisiana, to be holden at the city of New Orleans, on the 3d Monday of May inst., to answer to the complaint of Charles McMicken, and that he do file his defence or answer with the clerk of said court, on or before the same, or judgment will be given against him by default; and have you then and there this writ.

Witness the honorable T. B. Robertson, judge of said court, at the city of New Orleans, this 1st day of May, 1827, and 51st year of the independence of the United States.

(Signed) T. M. LEA, *Deputy Clerk.*

*Cour de district des Etats Unis,*
*Pour le district oriental de la Louisiane:*

Le President des Etats Unis au marechal du district oriental de la Louisiane, ou a son deputé dument autorise, salut:

Vous etes commandé d'arreter le corps de Amos Webb, pour qu'il ait a comparaitre a la cour de district des Etats Unis pour le district oriental de la Louisiane, qui sugera dans la ville de la Nouvelle Orléans le 3ieme Lundi Mai inst., a l'effet de repon*de* a la plainte de Charles McMicken, et d'y remettre reponse ou defense au Greffier de la dite cour avant ou le meme jour, faute de quoi jugement par defaut sera rendu contre lui, et vous feres votre rapport de cette ordre.

Temoin l'honorable T. B. Robertson, juge de la dite cour a la ville de la Nouvelle Orléans ce 1ere jour de Mai, 1827, et la 51ieme anee de l'independence des Etats Unis.

(Signé) T. M. LEA, *Deputé Greffier.*

A true copy from the original on file in the clerk's office.

(Signed) T. M. LEA, *Deputy Clerk.*

*Endorsement.*—(In the absence of the judge.)

Let the defendant be held to bail in ten thousand dollars.

(Signed) T. M. LEA, *Deputy Clerk.*

*May 1st*, 1827.

*Marshal's return.*

Served this writ according to law, and received the bail bond thereto annexed this 5th day of February, 1828.

(Signed) ROBERT J. NELSON, *Deputy Marshal.*

*Annexed bail bond.*

*District court of the United States,*
*For the eastern district of Louisiana:*

Know all men by these presents, that we, Amos Webb, principal, Alexander Barrow and William R. Barrow, sureties, are held and firmly bound unto John Nicholson, marshal for the eastern district of Louisiana, in the sum of ten thousand dollars, lawful money of the United States, to be paid to the said John Nichols, his heirs, executors, administrators, assigns, or successors in office; for which payment, well and truly to be made, we bind ourselves, our heirs, executors, or administrators, jointly and severally, firmly by these presents. Sealed with our seals, and dated this 5th day of February, in the year of our Lord one thousand eight hundred and twenty-eight.

The condition of the above obligation is such, that whereas the above bounden Amos Webb is now in the custody of the said John Nicholson, marshal as aforesaid, by virtue of a capias and respondendum, issued out of the district court of the United States for the eastern district of Louisiana, in an action of debt at the suit of Charles McMicken, and released therefrom by reason of signing, sealing, and delivering these presents.

Now, if the said Amos Webb, in case he should be cast in the said suit, shall pay and satisfy the judgment of the said court therein, or surrender himself in execution to the said John Nicholson, marshal as aforesaid, then the above obligation to be null and void, or else to remain in full force and virtue.

Signed, AMOS WEBB,
" WM. R. BARROW,
" ALEXANDER BARROW.

Witnesses present:

Signed—Jos. E. Johnson, Jr.
" Rob't J. Nelson.

*Endorsement.*

C. McMicken
vs.
Amos Webb.

Served 5th February, and held defendant to bail; which bond and writ are now returned into court, this 16th February, 1828.

Signed, J. NICHOLSON, *U. S. marshal.*

*Exception filed 5th June*, 1827.

To the honorable the judge of the court of the United States for the eastern district of Louisiana:

Amos Webb, who is impleaded at the suit of Charles McMicken, comes (and reserving his right to answer on the merits) and excepts to the petition of the said Charles McMicken.

1st. For that the petition of the said Charles does not set forth his cause of action fully and sufficiently, and in particular does not set forth and allege any assignment to him by McMicken & Ficklin, the payees of the note described in the petition, or shew how, or in what manner, or for what reasons, on any original contract or consideration, by reason whereof he the said Charles is, or ought to be, alone entitled to the benefit of the note set forth and described in his petition, or to receive solely and individually the contents thereof; wherefore the said Amos prays the judgment of the court whether he is bound to answer the petition, and that the same be dismissed with costs.

2nd. For that the said petition of the said Charles sets forth, and demands from the said Amos, as one of the drawers thereof, the repayment to him the said Charles, (as entitled to receive the same,) and as a citizen of the State of Pennsylvania entitled to institute suits in this court against the citizens of the State of Louisiana, of a promissory note made payable to McMicken & Ficklin, and does not allege that a suit might have been prosecuted in this court to recover the contents thereof, if no assignment thereof had been made; wherefore, &c.

3rd. For that the said petition of the said Charles does not set forth and allege that, at the time of making the said promissory note, McMicken & Ficklin, the payees thereof, could have prosecuted the said Amos as one of the makers thereof; wherefore, &c.

4th. And if these exceptions be overruled, the said Amos denies that he is a citizen of the State of Louisiana, and insists, and avers, that he is a citizen of the State of Kentucky; wherefore he prays judgment of this court whether it has jurisdiction of this suit, and that the petition be dismissed with costs.

5th. And if it be proved that the said Amos is a citizen of the State of Louisiana, which, however, he denies as aforesaid, then the said Amos denies that, at the instituting of this suit, the said Charles was, or now is, a citizen of the State of Pennsylvania, or of any other State of the United States other than the State of Louisiana; and the said Amos avers that the said Charles is not a citizen of the State of Pennsylvania, and does not reside therein; and avers that he is a citizen of the State of Louisiana.

Wherefore the said Amos, reserving his right to answer on the merits in case the said exceptions and pleas be against him, prays judgment of the court whether this court has jurisdiction of the said suit, and that the petition and suit be dismissed with costs.

Signed, WATTS & LOBDELL,
*For defendant.*

*Exceptions and plea of res judicata.*

United States court, eastern district of Louisiana.

CHARLES MCMICKEN
vs.
AMOS WEBB.

Amendment to the exceptions and pleas filed by defendant.

And the said Amos, by leave of the court first obtained, amends his exceptions and pleas, and further excepts, pleads, and says, that heretofore, to wit, on or about the 12th day of February, in the year one thousand eight hundred and twenty-four, the said Charles instituted in this court, on the promissory note now sued on in this case, against him the said Amos, alleging that he the said Charles was a citizen of the State of Pennsylvania, and the said Amos was a citizen of the State of Louisiana; and the said Amos did then and there deny that the said Charles was a citizen of the State of Pennsylvania, and insisted, and averred, that he the said Charles was a citizen of the State of Louisiana, and that this court had no jurisdiction of said suit on said note. That at the *time* of this court held in the months of February and March, in the year 1826, a jury was empannelled to try the said issue, and that the said jury did then and there find a verdict that the said Charles was a citizen of the State of Louisiana, and this court gave a judgment that this court had not jurisdiction of said suit, by reason that the said Charles was a citizen of the State of Louisiana, and that the petition and suit of the said Charles should be dismissed; all which will appear more fully and at large by reference to said suit on file in this court, being suit No. of the suits of this court; a copy of the record of which is hereto annexed, and made part of this exception and plea. And the said Amos pleads the finding of the said jury, and the judgment of the court thereon as res judicata, by which the said Charles is bound, and contrary to which finding and judgment he is not permitted to allege or prove.

Wherefore the said Amos prays the judgment of the court, whether it will further entertain jurisdiction of this suit, and that the petition be dismissed with costs.

Signed, WATTS & LOBDELL,
*For defendant.*

District court of the United States, eastern district of Louisiana.

Be it remembered that, on the third day of March, in the year of our Lord one thousand eight hundred and twenty-four, into the court of the United States for the eastern district of Louisiana, came Charles McMicken, by his attornies Carleton & Lockett, and filed the following petition, to wit:

To the honorable the district court of the United States for the eastern district of Louisiana, the petition of Charles McMicken respectfully shews:

That he is a citizen of the State of Pennsylvania, and resides in Phil-

adelphia in said State; that some time in the year 1815, your petitioner and James H. Ficklin formed a partnership, and did business in the parish of Feliciana, in the State of Louisiana, under the firm and style of McMicken and Ficklin; that, on the 8th September, 1817, said partnership was dissolved by mutual consent; that, at the time of such dissolution, there was a quantity of goods and stock on hand, which said Ficklin took and purchased at costs, and for the payment of the one-half of said goods and stock he executed to your petitioner a promissory note, or obligation, in writing, dated September 20th, 1817, payable on the first of March, 1819, to the order of McMicken & Ficklin, for the sum of four thousand six hundred and sixty-six dollars ninety-three and a half cents, drawn and executed on said 20th September, 1817, by James H. Ficklin, Jed. Smith, and Amos Webb.

Your petitioner further shews that said Amos Webb is a citizen of the State of Louisiana, and resides in said district; that, by said note or obligation, the drawers thereof promised, jointly or separately, to pay to your petitioner and said Ficklin said sum of four thousand eight hundred and sixty-six dollars ninety-three and a half cents, whereby each of them have become, jointly and severally, indebted to your petitioner in the said sum of four thousand eight hundred and sixty-six dollars ninety-three and a half cents, as will appear from a copy of said note or obligation annexed, and prayed to be taken as part of this petition; payment of the amount whereof is refused when amicably demanded.

Your petitioner further shews, that he is the sole and legal owner of said promissory note or obligation in writing, the same having been given by the drawers thereof after the dissolution of the partnership as aforesaid, for his only use and benefit, as he will in due time make appear.

Your petitioner further prays that said Amos Webb may be cited to answer this petition; that he may be decreed to pay said sum of four thousand eight hundred and sixty-six dollars ninety-three and one-half cents, with interest, according to the tenor of said note or obligation, to wit, at the rate of 10 per cent. per annum from the time the same became due until paid, together with the costs of this suit; that the said Webb may be held to bail, and that such other relief may be had that the case may require; and that this cause may be enquired of by a jury; and your petitioner, &c.

Signed, CARLETON & LOCKETT,
*Atty's for plaintiff.*

*Copy of the note.*

$4,866 93½. ST. FRANCISVILLE, *September 20th*, 1817.

On the first day of March, 1819, we, or either of us, promise to pay, jointly or separately, unto McMicken & Ficklin, or order, four thousand eight hundred and sixty-six dollars ninety-three and a half cents, being for value received, with ten per cent. after due until paid.

Signed, JAMES H. FICKLIN,
" JED. SMITH,
" AMOS WEBB.

On which petition is the following endorsement, to wit:
Citation waived; service of petition acknowledged, 12th Feb'y, 1824.
Signed, WATTS & LOBDELL,
*Atty's for defendants.*

And afterwards, to wit, on the 16th day of February, 1824, came Amos Webb, by his attornies Watts & Lobdell, and filed the following answer, to wit:

To the honorable the judge of the district court of the United States, sitting for the eastern district of Louisiana:

Amos Webb, of the parish of Point Coupee, State aforesaid, to the petition of Charles M'Micken, exhibited against him in this court, comes and says, that he denies that the said Charles McMicken is a citizen of the State of Pennsylvania, and resides in Philadelphia; and the said Amos Webb (protesting that he does not admit that he signed or made the note set forth in the said petition) insists and charges that, at the time the said note was made as set forth in the petition, the said Charles McMicken was, and ever since has been, and now is, a citizen and resident of the State of Louisiana, and not of the State of Pennsylvania, which the said Amos Webb is ready to verify; wherefore the said Amos Webb prays judgment of the court whether the court will take further cognizance of this suit; that the matters of fact herein set forth be tried by a jury, and that the said petition be dismissed with costs.

Signed, WATTS & LOBDELL, *Atty's.*

*State of Louisiana, city of New Orleans:*

Charles Watts being duly sworn, deposeth and saith, that the above plea to the jurisdiction is put in with a view to try the fact of the citizenship and residence of the plaintiff, and not for the purpose of delay.
Signed, C. WATTS.

Subscribed and sworn, this 16th day of February, 1824, before me,
J. BERMUDEZ,
*Justice of the peace, 1st district.*

And afterwards came the said Amos Webb, by his said attornies, and filed the following amended answer and exceptions, to wit:

To the honorable the judge of the court of the United States for the eastern district of Louisiana:

Amos Webb, of the parish of Point Coupee, to the petition of Charles McMicken, exhibited against him in this court, says, that he prays oyer of the note referred to and mentioned in the petition, and it is read in the words and figures following:

And thereupon said Amos Webb, by protestation that he ever made said note, excepts to the petition for this, that the petitioner does not set forth sufficient matter to give this court jurisdiction of the suit; for this, that petitioner, as holder of said note, has instituted suit on said promissory note against respondent as drawer thereof; and petitioner is not

payee thereof, but McMicken & Ficklin are payees thereof. And petitioner does not in his petition allege that the said note was assigned to him, and that a suit could have been prosecuted in this court at the time of making said note by said payees, or by any person who was entitled to receive the contents of the same against respondent as drawer thereof, to receive the contents of the said promissory note if no assignment thereof had been made; thereupon respondent prays judgment that said petition be dismissed, for want of sufficient matter alleged therein to give this court jurisdiction thereof.

2nd. And for further exception respondent prays oyer, &c.; and it is read, &c.; and he excepts, &c.; for that petitioner does not allege that suit could have been prosecuted on said note in this court, at the time of making thereof, or at any time thereafter, by said payees against respondent as drawer thereof, &c.; whereof, &c.

3rd. And if said exceptions be overruled, respondent for answer to said petition, or to so much thereof as this respondent is advised it is material for him at this time to answer, he answers, and denies that Charles McMicken is a citizen of the State of Pennsylvania, and resides in the city of Philadelphia; and said Amos Webb (by protestation that he ever made said note set forth in the petition) insists, that at the time said note referred to in the petition was made, Charles McMicken was, and ever since has been, and now is, a citizen and resident of the State of Louisiana, and not of the State of Pennsylvania; and respondent prays that the matter of fact above set forth be enquired of by a jury; that the petition be dismissed with costs; and if the matter of fact be found against respondent, he reserves his right to answer said petition on the merits.

4th. And if the matter of fact be found against the respondent, he excepts to said petition; that the same is contradictory and inconsistent, and cannot safely be answered by respondent on the merits; for this, that petitioner in one part of his petition alleged that James H. Ficklin made and executed the said note sued on in favor of petitioner, and in another part of his petition alleges that the note sued on was made and executed, jointly and severally, by James H. Ficklin, Jed. Smith, and Amos Webb, in favor of McMicken & Ficklin; and yet petitioner does not allege and set forth any endorsement, or other means, by which he became entitled to and claims the sole benefit and interest in said note. Wherefore respondent prays that said petition be dismissed at the costs of the petitioner, as being uncertain, contradictory, and inconsistent, and as not setting forth any title in petitioner to claim the sole and exclusive ownership thereof, or any sufficient obligation in respondent to pay the same to him; and if your honor overrule his exceptions, he avers his right to answer over to the merits.

Signed, WATTS & LOBDELL,
*Atty's for petitioner.*

And afterwards, to wit, on the 28th day of March, 1826, the following judgment was entered of record, to wit:

*Tuesday, 28th March,* 1826.

Present, the honorable T. B. Robertson.

CHARLES MCMICKEN vs. AMOS WEEB. } No. 2,109.

On this day came the parties, by their attornies, and thereupon came a jury, to wit: —— Dermas, Antoine Delhonare, H. Hattier, S. Springstein, H. Hunt, Philip Dodet, J. S. Williams, Pre. Caillon, Jedediah Ellis, Sauvans Chassé, Verrion, and John Goldenbow, who were sworn well and truly to try the issue joined between the parties, and who, after hearing the evidence, retired to consider of their verdict; and after some time returned the following verdict, to wit: We, the jury, find the plaintiff is a citizen of the State of Louisiana.

Signed, ANTOINE DELHONARE, *Foreman.*

Whereupon it is considered by the court, that the petition be dismissed with costs.

*Court of the United States,*
*eastern district of Louisiana:*

I, Franklin W. Lee, deputy clerk of said court, do hereby certify the foregoing to be a true transcript of the petition, answer, and amended answer and pleas, verdict of the jury, and judgment of the court thereon, in the case No. 2,109, entitled Charles McMicken vs. Amos Webb.

Witness my hand, and the seal of said court, at the city of New Orleans, this 28th day of November, 1827, and this 52nd of American independence.

Signed, T. W. LEE, *Deputy clerk.*

Order of court, 10th December, 1827.

*Monday, 10th December,* 1827.

CHARLES MCMICKEN vs. AMOS WEBB. } No. 2,504.

On reading service of notice of motion on Isaac T. Preston, and, on motion of C. Watts for Webb, ordered that the defendant have leave to add the exceptions of *res judicata* to the exceptions filed by him.

Order of court, 25th February, 1828.

*Monday, 25th February,* 1828.

The court met pursuant to adjournment. Present, the honorable T. B. Robertson.

CHARLES MCMICKEN vs. AMOS WEBB. } No. 2,504.

On motion of Isaac T. Preston, of counsel for plaintiff, it is ordered that he have leave to file a supplemental petition in this case.

Supplemental petition filed 26th February, 1828.

To the honorable judge of the district court of the United States for the eastern district of the State of Louisiana.

The supplemental petition of Charles McMicken against Amos Webb, respectfully shows:

That your petitioner files the agreement of the 8th September, 1817, by which the partnership between him and James H. Ficklin was dissolved. Your petitioner alleges that he has faithfully complied with all the allegations contracted by him in said agreement; that he has made all the collections for said firm in his power, and paid the debts for the same; on which account there remains due to him, from the succession of his late partner, nine hundred and sixty-nine dollars and sixty-five cents. He alleges that, at the time of the dissolution of their partnership, the said firm was indebted to him to the full amount of their stock of goods on hand; and that the note purporting to have been given to the firm of McMicken and Ficklin, by James H. Ficklin, Jed. Smith, and the defendant, was really given to your petitioner in consideration of his interest in the stock of the firm of McMicken & Ficklin; wherefore your petitioner prays as in his original petition, as in duty, &c.

Signed, ISAAC T. PRESTON, *For petitioner.*

Memorandum of an agreement made and entered into this 8th day of September, 1817, between Charles McMicken, jr., and James H. Ficklin, both of the town of St. Francisville, lately trading under the firm name of McMicken & Ficklin, that they have this day, by mutual consent, dissolved their co-partnership aforesaid, and that Charles McMicken, jr., is put in full possession of all the books, notes, and accounts, and all other papers relating to the firm aforesaid, with full power to settle and collect all dues and demands owing to the said firm, either at law or otherwise, by exchange or re-exchange of notes or accounts, or any other mode he may think advantageous to the concern; and when in funds sufficient to pay off all debts that are due by the firm aforesaid, to pay the same until full and final payments and settlements are made, and to employ at his discretion such person or persons as he shall think necessary to the completion of the business; and that James H. Ficklin takes all the goods on hand at cost, with the addition of five per cent. on the whole amount, payable as follows, viz: three thousand by his draft on Flower & Finley, with their acceptance thereof, payable on the first March, 1818, and their acceptance in the same manner, or some good house in New Orleans in their stead, for any further sum to meet the one-half of the whole amount of goods payable on the first day of May, 1818; and for the remaining half he gives his joint note, with Amos Webb and Jedediah Smith, payable on the 1st of March, 1819; and by the non-compliance of James H. Ficklin in giving the aforesaid acceptance and note, this agreement to remain null and void as far as the sale of the goods to him; and all the sales of goods by him, for the period of thirty days, the time allowed him to comply with the foregoing, shall be carried to the joint benefit of the late firm.

In witness whereof we hereunto subscribe our names, the day and date above written.

Signed, JAMES H. FICKLIN,
CHARLES McMICKEN, Jr.

$4,866 93½. St. Francisville, 20*th September*, 1817.

On the first day of March, 1819, we, or either of us, promise to pay, jointly or separately, unto McMicken & Ficklin, or order, four thousand eight hundred and sixty-six dollars ninety-three and a half cents, being for value received, with ten per cent. after due until paid.

(Signed) JAMES H. FICKLIN,
" JED. SMITH,
" AMOS WEBB.

State of Louisiana, *Parish of West Feliciana:*

Personally appeared before me, John B. Dawson, parish judge and ex-officio notary public, the undersigned, David Flower and Joseph L. Finley, and William H. Johnson, who, being duly sworn according to law, depose and say, that they have, at the request of Charles , carefully examined and compared the foregoing copy with the original agreement of dissolution of partnership of the late firm of McMicken & Ficklin, and signed by James H. Ficklin, now deceased, and Charles McMicken, jr., and in their own proper handwriting, having frequently seen them write; they further declare and say that they have carefully examined and compared the foregoing copy of a note with the original note of hand, dated St. Francisville, 20th September, 1817, in favor of McMicken & Ficklin, and payable the 1st day of March, 1819, for four thousand eight hundred and sixty-six dollars ninety-three and a half cents, and signed by James H. Ficklin and Jed. Smith, now deceased, and Amos Webb, and find it a correct and true copy of said original note of hand; and that the signatures thereto are in the proper handwriting of James H. Ficklin, Jed. Smith, and Amos Webb, and having been intimately acquainted with all of them, and with their handwriting, have oftentimes seen them write. The above statement is made at the request of Charles McMicken, the present holder of said original note.

In witness whereof we have hereunto set our hands and seals, in the presence of said parish judge and the subscribing witness, this 8th day of February, in the year of our Lord 1828.

(Signed) DAVID FLOWER,
" J. L. FINDLEY,
" WM. H. JOHNSON.

Witness present:

(Signed) R. H. Hale,
" Joseph E. Johnson, Jr.

State of Louisiana, *Parish of West Feliciana:*

I certify, by these presents, that the foregoing testimony was given to me under oath, in presence of R. H. Haile and Jos. E. Johnson, jr., who have signed as witnesses.

Given under my hand and seal official, this 8th day of February, 1828.

(Signed) JOHN B. DAWSON, *Parish Judge.*

STATE OF LOUISIANA, *Parish of West Feliciana:*

I, John B. Dawson, parish judge of the parish aforesaid, and ex-officio notary public in and for the same, do, by these presents, certify that the memorandum of an agreement and dissolution, and notes, were recorded this 11th day of February, A. D. 1828, in Notarial Record "A," pages 347, 348, now in my office.

Given under my hand and seal official, February 11th, 1828.

(Signed) JOHN B. DAWSON, *Parish Judge.*

A true copy of the original on file in the clerk's office, in the case of C. McMicken vs. Amos Webb.

(Signed) F. W. LEA, *Deputy Clerk.*

Exceptions and pleas filed May 19th, 1828.

To the honorable the judge of the court of the United States for the eastern district of Louisiana:

Amos Webb, who is impleaded at the suit of Charles McMicken, comes, and reserving his right to answer on the merits and pleadings de novo, as he is by law entitled to do, since the filing of the supplemental petition, and considering the petition and the supplemental petition as a new petition, the said Amos excepts to said petition and supplemental petition, for this: That 1st, the petition of said Charles does not set forth or allege any assignment to him by McMicken & Ficklin, the payees of the note described in his petition, or shew how, or in what manner, or for what reason, or any original contract or consideration, by reason whereof he, the said Charles, is and ought to be alone entitled to the benefit of the note set forth and described in his petition, or to receive solely and individually the contents thereof, or any agreement or contract by virtue whereof the said Amos is bound to pay him the same. Wherefore the said Amos prays the judgment of the court whether he is bound to answer the petition, and that the same be dismissed with costs.

Secondly. The said Amos further excepts for this: 2ndly, that in and by said petition it appears and is set forth, that J. H. Ficklin was the principal debtor, and that said Amos is a mere security in the note sued on; that the note sued on is in favor of McMicken & Ficklin, and the said Charles in his petition, without alleging any assignment or transfer to him, asks and demands that the whole amount of said note be paid to him individually, thereby varying, increasing, and seeking to render more burthensome the obligation of the said Amos, without shewing any legal right so to do, or any legal obligation on the part of the said Amos, surety as aforesaid, to pay him, the said Charles, the whole amount of the contents of the said note; wherefore, the said Amos, &c.

Thirdly. And the said Amos further excepts to the said petition, for—3rdly, that said petition is deficient, insufficient, incomplete, and *to* general in its allegations, and does not set forth the cause of action fully

and sufficiently, and one to which said Amos is not bound to answer; for that, after setting forth the dissolution of the partnership of McMicken & Ficklin, whereby it appears that said McMicken was charged with the settlement of the partnership concerns of McMicken & Ficklin, and that said Ficklin was the principal debtor in the note sued on, and that said Amos is a mere security, the said Charles alleges, that he has made all the collections for said firm in his power, and paid the debts of the same, and that there remains due to him from the succession of his late partner the sum of nine hundred and sixty-nine dollars and sixty-five cents; whereas, the said Charles is bound to set forth and exhibit a full and particular account of liquidation and settlement of said partnership affairs, exhibiting the particular items and details of his transactions and proceedings in the settlement of said partnership affairs, charged with the settlement of said partnership affairs, is bound in law and justice to exhibit such a detailed settlement and account, before the said Amos is or can be called upon to answer the said petition, demanding to recover from him, the said Amos, security as aforesaid, the amount of the note mentioned and described in the petition.

Wherefore, the said Amos prays the judgment of the court, whether he is bound to answer the said petition, and that the same be dismissed with costs.

4th. The said Amos further excepts to said petition, for that the said petition of the said Charles sets forth and demands from the said Amos, as one of the drawers thereof, the payment to him, as being in some way entitled to receive the same, the contents of a promissory note, as a citizen of the State of Pennsylvania, entitled to institute suit in this court against citizens of the State of Louisiana, on a promissory note payable to McMicken & Ficklin, and does not allege that a suit might have been prosecuted in this court to recover the contents thereof by the payees, if no assignment thereof had been made; wherefore, the said Amos prays judgment of the court, whether the court will entertain jurisdiction of the suit, and that the same be dismissed with costs.

5th. Also fifthly, for that the said petition of the said Charles does not set forth and allege, that at the time of the making of said promissory note, or of any assignment or transfer thereof to him, that McMicken and Ficklin, the payees thereof, could have prosecuted the said Amos, one of the makers thereof, in this court, to recover the contents thereof; wherefore, the said Amos, &c., as before.

6th. And the said Amos sixthly denies, that at the time of the institution of the suit the said Charles was a citizen of the State of Pennsylvania, or of any other State of the United States but the State of Louisiana, and the said Amos avers, that the said Charles is a citizen of the State of Louisiana, and avers that he is not a citizen of the State of Pennsylvania, and does not reside therein.

7th. And the said Amos further seventhly excepts, for this, that heretofore, to wit, on the 12th of February, 1824, the said Charles instituted in this court, on the promissory note now sued on in this case, a suit against him, the said Amos, alleging that the said Charles was a

citizen of the State of Pennsylvania, and that the said Amos was a citizen of the State of Louisiana; and the said Amos did then and there deny that he, the said Charles, was a citizen of the State of Pennsylvania, and insisted and averred that he, the said Charles, was a citizen of Louisiana, and that this court had not jurisdiction of said suit on said note; that at the term of the court held in the month of February and March, 1826, a jury was empannelled to try the said issue, and that the said jury did then and there find a verdict, that the said Charles was a citizen of the State of Louisiana, and judgment was therefore given, that the petition of the said Charles should be dismissed with costs; all which will appear more fully and at large by reference to said suit in this court, a copy of the record of which is hereto annexed, and prayed to be made a part of this exception and plea, more fully will appear; and the said Amos pleads the finding of the jury, and the judgment of the court thereon, as res judicata, by which the said Charles is bound, and contrary to which finding and judgment he is not permitted to allege or prove. Wherefore the said Amos prays the judgment of the court, whether it will further entertain jurisdiction of this suit, and that the petition be dismissed with costs.

Signed, WATTS & LOBDELL, *for Def't.*

*Order of court of the 1st June*, 1829.

CHARLES McMICKEN vs. AMOS WEBB. } No. 2504.

Exceptions to plaintiff's petition.

The court having heard the argument of counsel, now order that the exceptions be overruled, and that the issue of fact as to the citizenship of the plaintiff be reserved for a jury.

*Order of court of 3rd June*, 1829.

*Wednesday, 3rd June*, 1829.

The court met pursuant to adjournment. Present: the honorable Samuel H. Harper.

CHARLES McMICKEN, vs. AMOS WEBB. } No. 2504.

On motion of C. Watts, and on filing an affidavit, it is ordered, that a commission issue to Robert C. Wederstrundt, a justice of the peace of the parish of West Feliciana, to examine witnesses on the part of the defendant.

*Order of court of 14th January*, 1830.

*Thursday, 14th January*, 1830.

The court met pursuant to adjournment. Present: the honorable Samuel H. Harper.

1012.



CHARLES MCMICKEN, vs. AMOS WEBB. } No. 2504.

On this day came the parties by their attornies, and thereupon came a jury, to wit, Daniel Goodman, George Green, Wm. Williams, S. Andler, Valery Willy, James Foster, jr., A. Whitney, James Hubbard, J. B. Hullin, James Tirel, J. B. Planché, and E. B. Hyde; who were sworn well and truly to try the issue joined between the parties, and who, after hearing the evidence and argument of counsel, retired under the charge of the court to consider their verdict, and soon after returned the following, to wit:

*New Orleans, January 14th*, 1830.

We the jury find a verdict that the plaintiff is not a citizen of Louisiana, and is a citizen of Pennsylvania.

GEORGE GREEN, *Foreman.*

Whereupon it is considered by the court, that the plea to the jurisdiction be overruled, and that defendant answer to the merits.

*Order of court of 15th January*, 1830.

*Friday, 15th January*, 1830.

The court met pursuant to adjournment. Present: honorable Samuel H. Harper.

CHARLES MCMICKEN vs. AMOS WEBB. } No. 2504.

On motion of Charles Watts, for defendant, it is ordered, that the plaintiff shew cause on to-morrow, at 10 o'clock, A. M., why a new trial should not be granted in this case, on the grounds, 1st, that the verdict is contrary to evidence; 2nd, that illegal testimony is admitted; 3rd, that there was error in the charge of the judge.

*Order of court of 23rd January*, 1830.

*Saturday, 23rd January*, 1830.

The court met pursuant to adjournment. Present: honorable Samuel H. Harper.

CHARLES MCMICKEN vs. AMOS WEBB. } No. 2504.

The court having maturely considered the motion for a new trial in this case, now order that the verdict of the jury be set aside, and a new trial awarded, on the ground that the testimony taken (de bene esse) in Philadelphia is illegal.

*Order of court of same date.*

*Saturday, 23rd January*, 1830.

The court met pursuant to adjournment. Present: Hon. Samuel H. Harper.

CHARLES McMICKEN
vs.
AMOS WEBB. } No. 2504.

On motion of Isaac T. Preston, ordered, that he have leave to take out commissions in this case, and that he have leave to withdraw the depositions taken de bene esse in Philadelphia.

Order of court of 6th March, 1830.

*Saturday*, 6*th March*, 1830.

The court met pursuant to adjournment. Present: hon. Samuel H. Harper.

CHARLES McMICKEN
vs.
AMOS WEBB. } No. 2504.

On this day came the parties by their attorneys, and thereupon came a jury, to wit: Robert Brand, Henry Perret, Juan Castileanos, Wm. Thompson, John Goldenbow, David Law, D. Munroe, James Pench, Wm. G. Hewes, Patrick Thompson, Benj. Hart, and Jonathan Davis; who were sworn well and truly to try the issue joined between the parties, and who, after hearing the evidence and argument of counsel, retired under the charge of the court to consider of their verdict; when, after considerable delay, there being no probability of their soon agreeing, they were, by consent of parties, directed to return a sealed verdict; which, after considerable delay, they accordingly did.

Order of court of 8th March, 1830.

*Monday*, 8*th March*, 1830.

The court met pursuant to adjournment. Present: hon. Samuel H. Harper.

CHARLES McMICKEN
vs.
AMOS WEBB. } No. 2504.

The sealed verdict of the jury in this case, being opened by consent of parties in open court, is as follows, to wit: we, of the jury, find that the plaintiff is a citizen of the State of Louisiana. New Orleans, March 6th, 1830. WM. G. HEWES, *Foreman.*

Whereupon it is considered by the court that the petition be dismissed for want of jurisdiction.

Order of court of 10th March, 1830.

*Wednesday*, 10*th March*, 1830.

The court met pursuant to adjournment. Present: hon. Samuel H. Harper.

CHARLES McMICKEN
vs.
AMOS WEBB. } No. 2504.

Grounds for a new trial that the verdict is contrary to law and evidence. (Signed) CARLTON & LOCKETT.

On motion of H. Lockett, of counsel for plaintiff, it is ordered that the defendant shew cause, on the first day of the next term of this court, why a new trial should not be allowed on the grounds filed.

Order of court, 20th March, 1830.

*Saturday, 20th March*, 1830.

The court met pursuant to adjournment. Present: hon. Samuel H. Harper.

CHARLES MCMICKEN vs. AMOS WEBB. } No. 2504.

The rule taken in this case having been, by consent of plaintiff, taken up now instead of on the first day of next term of this court, and submitted to the court, it is now ordered that the same be overruled.

Order of court of 20th May, 1830.

*Thursday, 20th May*, 1830.

The court met pursuant to adjournment. Present: hon. Samuel H. Harper.

CHARLES MCMICKEN vs. AMOS WEBB. } No. 2504.

On motion of C. Watts, esq., for defendant, ordered that Isaac T. Preston, att'y for plaintiff, shew cause on Saturday, the 29th day of May, 1830, why the costs in this case should not be taxed according to the bill made out by the clerk. Finis.

Clerk's office U. S. district court, eastern district of Louisiana.

I, Duncan N. Hennen, clerk of the district court of the United States for the eastern district of Louisiana, do hereby certify the foregoing thirty-four pages to be a true and faithful transcript of the record of the pleadings, orders, and proceedings in the matters of Charles McMicken vs. Amos Webb, No. 2504 of the docket of suits in this court, so fully as the same now remains on file in my office.

In testimony whereof I have hereunto set my hand and affixed the seal of the said court, at the city of New Orleans, this 2nd day of January, A. D. 1835, and of the independence of the United States the 59th year.

DUNCAN N. HENNEN, *Clerk*.

N. O., Jan'y 2nd, 1835.

I, Samuel H. Harper, judge of the district court of the United States for the eastern district of Louisiana, do hereby certify, that Duncan N. Hennen, who has signed the foregoing certificate, is and was at the time of so doing clerk of said court, that said certificate is in due form of law, and that to his official attestations full credit is due.

Witness my hand and seal, at New Orleans, this 2nd of January, 1835.

SAMUEL H. HARPER, *Judge U. S.*

Filed July 16th, 1835. B. COLLINS, *Clerk*.

To the honorable the judge of the third judicial district court for the parish of West Feliciana, of the eastern circuit division of the State of Louisiana.

The petition of Charles McMicken, residing in the city of Philadelphia, and State of Pennsylvania, respectfully represents: That Mrs. Mary Ann Grey, now wife of Doctor Ira Smith, residing in the parish of West Feliciana aforesaid, is justly indebted to petitioner in the sum of four thousand eight hundred and sixty-six dollars and ninety three and one-half cents, with ten per cent. interest from the first day of March, eighteen hundred and nineteen; for this, to wit, that on the twentieth day of September, in the year eighteen hundred and seventeen, James H. Ficklin, now dec'd, Jedediah Smith, now dec'd, then the husband of the said Mary Ann, and Amos Webb, made their certain promissory note in writing, by which said note they jointly and severally (in solido) promised to pay to McMicken and Ficklin, or order, the aforesaid sum of four thousand eight hundred and sixty-six dollars ninety-three and one-half cents, with ten per cent. interest from the first day of March, in the year eighteen hundred and nineteen, for value received, as will appear by the said note to be produced on triel, a copy of which is hereunto annexed. Sheweth that said note, although erroneously made payable to the then late firm of McMicken & Ficklin, consisting of this petitioner and the said James H. Ficklin, was and is the sole and separate property of this petitioner, the joint name being used, and intended for his sole use and benefit, said Ficklin being in no wise a party thereto, except as one of the obligors. Sheweth that the said note was given after the dissolution of the co-partnership between petitioner and said Ficklin, in part payment of a debt due by the said Ficklin to petitioner, according to a contract entered into between them at the time of the dissolution of the co-partnership. Sheweth that after the decease of the said Jedediah, the said Mary Ann took possession of all his estate, and accepted of the succession purely and simply, and has thereby rendered herself liable to pay all the debts due by the said succession; and that sufficient funds, belonging to the said succession, have come into the possession of the said Mary Ann to pay the debts due by said succession.

By reason whereof petitioner avers, that the said Mary Ann has become bound and liable to pay to petitioner the aforesaid sum of four thousand eight hundred and sixty-six dollars ninety-three and one-half cents, with ten per cent. interest as aforesaid, which said sum and interest has been often amicably demanded of the said Mary Ann and her husband, the said Ira Smith, but the same to petitioner to pay, or any part thereof, they have hitherto altogether neglected and refused, and still do neglect and refuse.

Wherefore, petitioner brings suit, and prays that said Mary Ann and Ira be cited to appear in your honorable court, in due course of law; and that they be condemned, by a judgment of said court, to pay to petitioner the said sum of four thousand eight hundred and sixty-six dollars ninety-three and one-half cents, with interest at ten per cent. per annum from the first day of March, in the year of our Lord one thou-

sand eight hundred and nineteen, and costs of suit; and for general relief, &c.

THOS. GIBBS MORGAN,
*Attorney for Petitioner.*

Copy of note.

$4,866 93½. *St. Francisville, Sept. 20th*, 1817.

On the first day of March, 1819, we, or either of us, promise to pay, jointly or separately, unto McMicken & Ficklin, or order, four thousand eight hundred and sixty-six dollars ninety-three and a half cents, being for value received, with ten per cent. after due until paid.

JAMES H. FICKLIN,
JED. SMITH,
AMOS WEBB.

Filed December 5th, 1828.

E. COOLEY, Jr.,
*Deputy Clerk.*

*The State of Louisiana, 3d district court,*
*Parish of West Feliciana:*

In the case of Charles McMicken vs. Ira Smith and wife, Mary Ann Grey.

To Ira Smith and wife, Mary Ann Grey, residing at the parish aforesaid: You are hereby cited to comply with the demand contained in the petition of Charles McMicken against you, a copy of which accompanies this citation, or deliver and file your answer thereto with the clerk of the aforesaid court, of the parish first aforesaid, in the town of St. Francisville, in ten days after the service hereof, and according to law, this 5th day of December, 1828.

Witness, E. COOLEY, Jr.,
*Deputy clerk of said court.*

*Endorsed.*—Executed by delivering to Ira Smith, on the road three miles from St. Francisville, a copy of this citation, 8th Dec'r, 1828.

M. COURTNEY, *Sheriff.*

Returned and filed December 8th, 1828.

E. COOLEY, Jr.,
*Deputy Clerk.*

*Documentary evidence ended.*

*State of Louisiana, parish of West Feliciana:*

I do hereby certify, that the foregoing is a true copy of the original petition, citation, &c., now of record and file in my office, this 15th day of January, A. D. 1835.

C. COLLINS,
*Deputy Clerk.*

Filed July 16th, 1835. B. COLLINS, *Clerk.*

CHARLES MCMICKEN
vs.
JAMES J. WEEMS, curator of est. Jas. H. Ficklin. } No. 108.

*Court of probates.*—Court in session July 23d, 1835.

The court this day delivered its opinion in the above entitled cause as follows, viz:

This cause has been remanded from the supreme court to allow the plaintiff an opportunity of shewing that prescription was interrupted. The cause was then taken up and tried on the pleadings and evidence as formerly adduced and used, with some additional testimony. The court sees no cause for changing its former opinion—the law and evidence being in favor of the plaintiff. It is therefore ordered, adjudged, and decreed, that the plaintiff do recover of the defendant the sum of five thousand four hundred and seventy-five dollars and twenty-six cents, with ten per cent. interest on the sum of $4,866 93½ (the note) from the first day of March, 1819, until paid, and five per cent. interest per annum on the sum of six hundred and eighty dollars thirty-two and a half cents, (the open account,) plaintiff remitting the balance of the interest allowed on the open account, from the 31st March, 1824, until paid; and the defendant pay the costs of suit.

JOHN B. DAWSON,
*July 30th*, 1835. *Parish Judge.*

*Appeal bond.*

*State of Louisiana, parish of West Feliciana:*

Know all men by these presents, that we, Jas. J. Weems, curator of Jas. H. Ficklin, and Joseph E. Johnson, are held and firmly bound unto Charles McMicken, his heirs, executors, administrators, curators, and assigns, in the sum of one hundred dollars; and for the payment thereof, we bind ourselves, our heirs, executors, administrators, curators, firmly by these presents. Sealed with our seals, and dated this 12th day of May, 1836.

Whereas, the above bounden James J. Weems, curator as aforesaid, hath this day filed his petition of appeal from a final judgment rendered against him in the probate court, in and for the parish aforesaid, in favor of the aforesaid Charles McMicken. Now, therefore, the condition of the above obligation is such, that if the said James J. Weems as aforesaid, shall prosecute his said appeal with effect, or shall pay or perform such judgment that may be rendered thereon against him, or if the execution that may issue, or such judgment, shall be satisfied out of his proper goods or chattels, lands or tenements, rights or credits, then, and in such case, the above obligation shall be null and void, or else to remain in full force and virtue.

JAMES J. WEEMS, [SEAL.]
*Curator of James H. Ficklin.*
JOS. E. JOHNSON. [SEAL.]

Witness.—B. COLLINS.
Filed May 12th, 1836. C. COLLINS, *Dep. Clerk.*

*Record.*

*State of Louisiana, parish of West Feliciana:*

At a session of the court of probates, began and held this second day of October, at the court-house of said parish, in the town of St. Francisville, being the first Monday of said month, in the year of our Lord one thousand eight hundred and thirty-seven.

Present, the Hon. John B. Dawson, judge of said court.

*Record.*

CHARLES MCMICKEN
vs.
JAMES J. WEEMS, curator of Ficklin's estate. } No. 108.

*October 10th*, 1837.

On motion of defendant, and presenting the decree of the supreme court rendered in said cause, it is ordered, that said decree be filed and spread upon the minutes of this court; and further ordered and decreed, that said decree be made the judgment of this court, and that execution thereof be had.

*Supreme court of the State of Louisiana:*

*Monday, January 6th*, 1837.

The court met. Present, the Hon. F. X. Martin; the Hon. H. A. Bullard.

Appeal from the court of probates of the parish of West Feliciana.

CHARLES MCMICKEN
vs.
JAS. J. WEEMS, curator of Ficklin's est., appell't.

In this case, the court this day delivered their opinion in writing, in the words and figures following, viz:

The facts disclosed in this case appear to be, that the plaintiff and Ficklin, the defendant, intestate, were partners in trade, and that the partnership was dissolved in September, 1817, by mutual agreement. By the same agreement, McMicken was in possession of all the books, notes, and accounts, with full power to settle and collect all dues and demands owing to said firm, and when in funds sufficient to pay off all debts due by the firm. Ficklin took all the goods on hand at an advance of five per cent., and paid to his partners one-half the price in drafts on a commercial house in New Orleans, and for the other half gave his note, with J. Smith and A. Webb, his securities, in solido, payable to McMicken & Ficklin, on the first of March 1819, amounting to $4,866 93½. The object of the present suit is to recover of the estate of Ficklin—1st, the amount of the promissory note last mentioned, on the allegation that it was erroneously made payable to the firm instead of the plaintiff; and, 2d, such balance as may be found due to the plain-

tiff on a final settlement of the partnership concern, which he alleges amounts to the further sum of $5,000. We shall consider the different branches of the case in the order in which they have been stated.

In regard to the promissory note of Ficklin, Smith and Webb, the allegation that it was made payable in error to McMicken & Ficklin, is negatived by all the evidence in the record. It was given for the price in the stock of goods which belonged to the firm, and of which, consequently, one undivided half belonged to Ficklin himself, the other half was paid to the plaintiff. According to the pretentions of the plaintiff, he would be entitled to the whole of the stock in trade, with an advance of five per cent., and Ficklin to nothing. If the goods had been sold to a stranger, each partner would have been entitled to one-half the price, and we cannot conceive how the case is altered when one of the partners becomes the purchaser. Undoubtedly if the plaintiff, who remained as liquidator of the concern, could shew that he had paid the debts of the firm beyond the amount of the notes and accounts which were placed in his hands for that purpose, he would be authorized to recover such an amount as would equalize the profits or losses between the parties. In that event, Ficklin's estate would be bound to refund or to pay the whole or a part of the note in question. Nothing authorizes us to presume that the partnership made no profits, and it is in the power of the plaintiff alone to shew the amount of debts which he has paid. He became the mandatory of his partners on the dissolution of the firm, and it does not appear that he has rendered any account of his gestion.

The auditors say, in their report, that the note in question was on the day of its maturity charged on their book in account to McMicken, and thereby became his individual property. This charge must have been made long after this dissolution of the partnership, while the books were under the exclusive control of McMicken, and consequently is not evidence against Ficklin; but, according to the same report, the whole debt of McMicken, including interest, amounts only to $6,434 19; whereas, if he had charged himself with the sum received from Flower & Finley, on account of the stock of goods sold to Ficklin, and the note in dispute, those two items alone would have amounted to upwards of nine thousand dollars. The auditors further say, that the acceptances mentioned were cashed and disposed of to the use of the firm; but it is not shewn in what manner they were disposed of, nor what debts were paid out of that fund. Auditors are appointed to state the respective accounts of parties, and they are bound to do so with sufficient precision and minuteness to enable the court to judge whether they acted correctly in rejecting or in allowing the articles in the accounts; Code Prac., 455; their opinion, therefore, as to the liability of Ficklin's estate to pay the note in question is not conclusive.

II. With respect to the unsettled accounts of the firm we have already intimated our opinion; the plaintiff cannot recover anything with rendering an account of his agency as liquidator. He is charged with the notes and the accounts put into his hands, except so far as he can

shew his inability to collect them. He is chargeable with the amount of Flower & Finley's acceptances, as respecting half the stock of goods; and he is further chargeable with any amount he may have received during the existence of the firm. He is *when* credited with the amount of the debts which he may shew he has paid out, any funds in his hands, and with his advances, according to the partnership agreement. Ficklin's estate is chargeable with one-half the stock of goods, as shewn by this note, and with any amount which he may have withdrawn from the concern during its existence, to be credited by any advances which he may have made. Neither the report of the auditors, nor the evidence in the records, enables us to finally decide between the parties, and to strike a balance, without the hazard of injustice to one or the other of the parties. The books alone are not evidence against the defendant of any transactions since the dissolution of the firm. Under these circumstances, as the case must be remanded, we think ourselves called on to express our opinion on some incidental questions to which our attention has been called. We concur with the court below in the opinion that it was not necessary to make the attorney of absent heirs a party in the first instance, and, consequently, that the suit was correctly dismissed, as related to him. The pleas of prescription were properly overruled at a former term of the supreme court; the case was remanded in order to enable the plaintiff to shew that prescription had been interrupted. This is now abundantly shewn in the record. It is therefore ordered, adjudged, and decreed, that the judgment of the court of probates be annulled, avoided, and reversed, the report of the auditors set aside, and that the case be remanded for further proceedings, according to law, the plaintiffs paying the costs of this appeal.

A true copy from the original. Clerk's office, New Orleans, February 20th, 1837.

H. CUVILLIER, *Dep. clerk.*

*Record.*

*State of Louisiana, parish of West Feliciana:*

At a session of the court of probates, began and held at the court-house of said parish, in and for the parish aforesaid, in the town of St. Francisville, on Monday, the 5th day of February, in the year of our Lord one thousand eight hundred and thirty-eight.

The honorable John B. Dawson, parish judge, and ex-officio judge of probates.

*Record.*

*February 12th*, 1838.

CHARLES MCMICKEN
vs.
JAS. J. WEEMS, Curator. } No. 108.

On motion of plaintiff's *of* counsel, it is ordered, that this case be referred to auditors; when plaintiff chose David Austen, and defendant Benjamin Collins. And it is further ordered, that said Austen and Col-

lins be appointed auditors to examine, adjust, and report, on the accounts existing between the plaintiff and James J. Weems, curator of the late James H. Ficklin, defendant; that Nicholas C. Hall be appointed umpire, and that said auditors make their report on or before the first day of the next term of this court; and cause continued.

*Probate court, March 5th, 1838.—March term.*

The honorable John B. Dawson, parish judge of said parish, presiding.

*Record.*

CHARLES MCMICKEN vs. JAS. J. WEEMS, Curator. } No. 108.

On motion of plaintiff, by counsel, it is ordered, that the rule of reference heretofore granted in this case be extended to the first day of the next term of this court; and cause continued.

*Court of probates, March term, 1839.*

Present, the honorable John B. Dawson, parish judge of said parish, presiding.

*Record.*

*State of Louisiana, parish of West Feliciana:*

CHARLES MCMICKEN vs. JAS. J. WEEMS, Curator. } March 27th, 1839.—No. 108.

John Barcley, who has lately been appointed by this court curator of the estate of Jas. H. Ficklin, deceased, (as will more fully appear by the letter of curatorship filed in this case,) prays leave of the court to be made party defendant to the above entitled suit.

Ordered, that the motion be allowed that the said Barcley be made party defendant in this case.

*Answer of Barcley.*

*Probate court, parish of West Feliciana:*

CHARLES MCMICKEN vs. JAS. J. WEEMS, Curator. }

John Barcley, who has lately been appointed by this court curator of the estate of James H. Ficklin, deceased, as will more fully appear by the letters of curatorship hereto annexed, prays leave of the court to be made party defendant to the above entitled suit. He also represents to this court, that he is the agent and attorney in fact of Joseph Ficklin and Jane Grooms, wife of Horatio Grooms, of the State of Kentucky, are the only surviving brother and sister of said James H. Ficklin, deceased, and his legal heirs, as will also appear from the power of attor-

ney hereto annexed. He prays that this court shall decide on the plaintiff's claim as speedily as the law and the nature of the case may admit; and prays hence to be dismissed, with his costs.

BOYLE,
*Attorney for petitioner.*

Filed March 27th, 1839.

CHS. B. COLLINS, *Clerk.*

*Barcley's letters of curatorship.*

*The State of Louisiana,*
*parish of West Feliciana:*

John B. Dawson, judge of said parish, and of the court of probates, in and for the same, to all who may see these presents:

"Know ye, that John Barcley having appeared in this court, and complied with the requisites and formalities of the law, to entitle him to letters of curatorship on the vacant estate of Jas. H. Ficklin, deceased; and it appearing to the satisfaction of the court that he is a fit and proper person to be entrusted with said appointment, therefore I, John B. Dawson, judge as aforesaid, do hereby appoint him, the said John Barcley, curator as aforesaid.

Given under my hand, and seal official, this 21st day of March, one thousand eight hundred and thirty-nine.

JOHN B. DAWSON, *Parish judge.*

Filed March 27th, 1839.

CHAS. B. COLLINS, *Clerk.*

*Power of attorney to Barcley and others.*

Know all men by these presents, that we, Joseph Ficklin and Jane Ficklin, (the only surviving brother and sister and heirs at law of James H. Ficklin, late of Feliciana, and State of Louisiana,) and Horatio Grooms, husband of Jane Ficklin, now Jane Grooms, have made, constituted, and appointed, and by these presents do make, constitute, and appoint, John Barcley, Joseph R. Thomas, and Henry Perkins, of Louisiana, our true and lawful attornies; hereby empowering each any one of our said attornies, as aforesaid, for us, and in our names, to sell and dispose of, and conveyances make, and to collect, by law or otherwise, all the property, real, personal, or mixed effects, assets, all sums of money due upon notes, bonds, accounts, choses in action, belonging to, or due to, the estate of James H. Ficklin, late of Feliciana, State of Louisiana; and especially to recover and receive from James J. Weems, the present or late curator of said estate, all the property, monies, and effects that have come, or may come, into his hands belonging to said estate. And whereas suit is now pending in the court of probates of the parish of West Feliciana, Louisiana, wherein Charles McMicken is plaintiff, and James J. Weems, curator as aforesaid, is defendant, and known on the docket of said court by its No. 108, upon which suit judgment has been rendered by said court upon the award of Murdock McQueen and William Leake, referees; which said judg-

ment has been appealed from to the supreme court of Louisiana, and by said supreme court remanded, so that the said suit remains undecided.

Now, being fully satisfied that the said award is just, this is further to authorize and empower *one* said attornies, or either of them, as aforesaid, for us, and in our names, to appear in said court of probates, and to ratify and confirm the award aforesaid, and to do all other acts, by confession of judgment or otherwise, to secure the benefit of said award to the plaintiff, the said Charles McMicken, in said suit; and generally, all and every other act or acts in the law whatsoever, needful and necessary to be done in and about the premises, for us, and in our names, to execute and perform, as fully and amply as we might or could do if personally present, with attornies, one or more under them, or either of them, for the purpose aforesaid, to make and constitute, and again at pleasure to revoke; hereby ratifying and confirming whatsoever our said attornies or attorney shall lawfully do touching the premises.

In witness whereof, we have hereunto set our hands and affixed our seals, this twenty-seventh day of July, one thousand eight hundred and thirty-eight.

JOSEPH FICKLIN, [L. S.]
JANE GROOMS, [L. S.]
HORATIO GROOMS. [L. S.]

Witnesses for Jos. Ficklin—
J. P. FULWILER,
EPHRAIM EWING.

Witnesses as to Jane Grooms and Horatio Grooms—
H. WINGATE, *J. P.*
JAMES SHANNON, *J. P.*

*State of Kentucky, Franklin county, to wit:*

We, James Shannon and Henry Wingate, two of the acting justices of the peace in and [for] aforesaid county, this day came the within named Jane Grooms and Horatio Grooms, who subscribed and acknowledged the within and foregoing letter of attorney to be their act and deed, for the purposes therein mentioned.

Given under our hands, this 7th day of August, 1838.

JAMES SHANNON, *J. P.*
H. WINGATE, *J. P.*

*State of Kentucky, Fayette county:*

Before us, James E. Davis and Daniel Bradford, two of the acting justices of the peace in and for the county of Fayette, and State aforesaid, came Joseph Ficklin, who subscribed and acknowledged the within and foregoing power of attorney to be his act and deed, for the purposes therein named.

Given under our hands, this 8th day of August, 1838.

JAMES E. DAVIS, *J. P. F. C.*
DAN. BRADFORD, *J. P. F. C.*

*Commonwealth of Kentucky, Executive department,*

*Frankfort, 11th August*, 1838.

I, James Clark, Governor of the Commonwealth of Kentucky, do hereby certify, that James Shannon and Henry Wingate, whose names are signed to the annexed certificate, were, at the time of the writing thereof, and now are, justices of the peace in and for the county of Franklin, and that James E. Davis and Daniel Bradford, whose names are signed to the annexed certificate, were, at the time of the writing thereof, and now are, justices of the peace in and for the county of Fayette; all of whom are duly commissioned, qualified, and acting as such, and by virtue of their said office fully authorized to take acknowledgments, administer oaths, &c., and to grant evidence thereof that their certificates are in due form of law; and full faith and credit are, and of right ought to be, reposed in all their official acts, as well out of, as in, courts of justice.

In testimony whereof, I have hereunto set my hand, and caused the seal of the Commonwealth to be affixed, at Frankfort, this 11th day of August, 1838, and in the 47th year of the Commonwealth.

JAS. CLARK.

By the Governor:

J. W. BULLOCK,
*Secretary of State.*

*State of Louisiana, parish of West Feliciana:*

I hereby certify the foregoing to be truly recorded in notarial record book "F," pages 482 and 483.

Given under my hand, and seal official, this 8th day of January, 1839.

JOHN B. DAWSON, *Parish judge.*

Filed March 27th, 1839.

CHS. B. COLLINS, *Clerk.*

*Record.*

*Probate court, West Feliciana, March 30th*, 1839.

CHARLES MCMICKEN
vs.
JAS. J. WEEMS, Curator of Ficklin. } No. 108.

In this case the parties, John Barcley, defendant, who has lately been appointed curator of the estate of James H. Ficklin, deceased, by this court, and duly authorized by the heirs of said Ficklin, as will appear from a power of attorney hereto annexed on the record of this suit, and Charles McMicken, plaintiff, have consented that the court shall enter up the following decree:

It is ordered, adjudged, and decreed, that the plaintiff, Charles McMicken, recover from the defendant, curator as aforesaid, the sum of five thousand four hundred and seventy-five dollars and twenty-six cents, $5,475 26, with interest at the rate of ten per cent. per annum, on the sum of six hundred and eight dollars thirty-two and a half cents,

$608 32½, from the thirty-first day of March, 1824, until paid; the same being balance of open account on which said interest is allowed, in accordance with the articles of copartnership, and ten per cent. interest per annum on four thousand eight hundred and sixty-six dollars ninety-three and a half cents, ($4,866 93½,) from the 1st day of March, 1819, till paid; the same being the amount of a note of hand made by James H. Ficklin, Jed. Smith, and Amos Webb, in favor of McMicken & Ficklin, and dated the 20th day of September, 1817, and made payable on the 1st day of March, 1819, with ten per cent. per annum interest until paid.

It is further ordered, adjudged, and decreed, that the first money that be made on this judgment, be applied to the discharge of the open account, say, $608 32, with interest as aforesaid, and the defendant pay the costs of suit.

*Judgment.*

*Probate court, West Feliciana:*

CHARLES MCMICKEN
vs.
JAS. J. WEEMS, Curator of Ficklin. } No. 108.

In this case the parties, John Barcley, defendant, who has lately been appointed curator of the estate of James H. Ficklin, deceased, by this court, and duly authorized by the heirs of said Ficklin, as will appear by a power of attorney hereto annexed on the records of this suit, and Charles McMicken, plaintiff, have consented that the court shall enter the following decree:

It is ordered, adjudged, and decreed, that the plaintiff, Charles McMicken, recover from the defendant, curator as aforesaid, the sum of five thousand four hundred and seventy-five dollars and twenty-six cents ($5,475 26) with interest, at the rate of ten per cent. per annum, on the sum of six hundred and eight dollars thirty-two and a half cents (608 32½) from the 31st day of March, 1824, until paid; the same being balance of open account, on which said interest is allowed, in accordance with the articles of co-partnership; and ten per cent. interest per annum on four thousand eight hundred and sixty-six dollars ninety-three and a half cents ($4,866 93½) from the 1st day of March, 1819, till paid; the same being the amount of a note of hand made by James H. Ficklin, Jed. Smith, and Amos Webb, in favor of McMicken & Ficklin, and dated the 20th day of September, 1817, and made payable on the 1st day of March, 1819, with ten per cent. per annum interest until paid. It is further ordered, adjudged, and decreed, that the first money that be made on this judgment be applied to the discharge of the open account, say (608 32½) with interest as aforesaid, and the defendant pay the costs of suit.

JOHN B. DAWSON,
*Parish Judge.*

March 30th, 1839.

Court of Probates, clerk's office.

STATE OF LOUISIANA, *Parish of West Feliciana:*

I, Charles B. Collins, clerk of said court, do hereby certify, that the foregoing seventy-six pages, together with this, contain a full, true, and complete transcript of all the proceedings had, evidence adduced, and documents of record on file in my office, in the case of Charles McMicken vs. James J. Weems, curator of the estate of James H. Ficklin, No. 108.

In testimony of all which, I have hereunto set my hand and affixed [L. S.] the seal of said court, this 2d day of April, 1839.

(Signed) CHAS. B. COLLINS, *Clerk.*

STATE OF LOUISIANA, *Parish of West Feliciana:*

I, John B. Dawson, parish judge and ex-officio judge of probates, in and for the parish and State aforesaid, do certify, that Charles B. Collins, whose certificate is affixed to the foregoing record, was, at the time the said certificate was made, and now is, clerk of the court of probates, in and for the parish of West Feliciana, State of Louisiana, and that said certificate is in due form of law.

Given under my hand and seal official, this day of April, 1839.

(Signed) JOHN B. DAWSON, *Parish Judge.*

Transcript of record, succession of J. H. Ficklin, deceased.

STATE OF LOUISIANA, *Parish of West Feliciana:*

To the honorable parish judge and ex-officio judge of probates, in and for the above parish and State:

The petition of Franklin Perin, who resides in the city and parish of New Orleans, and State aforesaid, respectfully shews: That one James H. Ficklin died about the year 1817, leaving in said parish a succession vacant; that, although letters of curatorship were granted to James J. Weems, and subsequently to John Barcley, the latter curator died, leaving the said succession still vacant and unsettled.

Wherefore your petitioner prays your honor to grant him letters of curatorship on the said vacant succession of the said James H. Ficklin, deceased; and he will ever pray, &c.

F. PERIN.

Court of Probates.

STATE OF LOUISIANA, *Parish of West Feliciana:*

Let notice of the application of Franklin Perin, to be appointed curator of the vacant estate of James H. Ficklin, deceased, be, according to law, by publication in the Bayou Sara Ledger, a newspaper printed in said parish of West Feliciana, and by posting at the door of the court-house of said parish, for the period of ten days from the date of said publication; and let Nathaniel Bowman, an attorney of law of said parish, be, and he is hereby, appointed counsel to represent the absent heirs of deceased; and it is further ordered, that an inventory of the property

belonging to the succession of said decedent be made by me, the undersigned judge, in my capacity of ex-officio notary public, on the 18th day of November, A. D. 1844, at my office in the town of St. Francisville; and Joseph A. Patterson and Frederick E. Mayo, male residents of said parish and State, over the age of twenty-one years, are appointed experts to appraise the property belonging to said succession.

JAMES J. WEEMS, *Parish Judge.*

October 25th, 1844.

Filed October 25th, 1844.

JAMES J. WEEMS, *Parish Judge.*

Filed 8th November, 1844.

CHAS. B. COLLINS, *Clerk.*

To the honorable the judge of the probate court, in and for the parish of West Feliciana, and State of Louisiana:

The petition of James L. Sterling, residing in the parish of West Feliciana, and State of Louisiana, respectfully represents: that one Franklin Perin, representing himself to be a citizen of the city and parish of New Orleans, did, on the 25th day of October, in the year eighteen hundred and forty-four, file his petition in your honorable court, praying your honor to appoint him curator of the estate of James H. Ficklin, late of the parish of West Feliciana aforesaid, deceased. Now, therefore, this petitioner opposes the appointment of said Franklin Perin (curator) as prayed for in his said petition, on the following grounds, to wit: That a suit is now pending in the United States circuit court at New Orleans, in the State of Louisiana, wherein Charles McMicken, of the State of Ohio, is plaintiff, and Amos Webb, and the heirs of Jedediah Smith, late of the parish of West Feliciana, deceased, are defendants; that said suit and claim of said plaintiff, McMicken, are based upon a note of hand, which purports to have been drawn by said James H. Ficklin, now deceased, (and formerly the commercial partner of said McMicken, in the parish of West Feliciana aforesaid,) and endorsed by said Amos Webb and said Jedediah Smith, now deceased; that said note in suit aforesaid, in principal and interest, now amounts to more than twelve thousand dollars; that said McMicken has for many years sought in vain to obtain judgment against said defendants for the amount of said note, claimed by him to be an amount due to him from the estate of said James H. Ficklin, deceased; that Sarah Perrie Smith, the wife of this petitioner, is one of the heirs of the said Jedediah Smith, and is consequently one of the defendants in the aforesaid suit.

Wherefore this petitioner is deeply interested in the proper settlement of said estate of said James H. Ficklin, deceased, and apprehensive that any indifferent person being appointed curator as aforesaid might be induced by said McMicken to take steps that would tend to the prejudice of said defendants, (and this petitioner feels this apprehension not without good cause;) petitioner prays that the prayer of said Franklin Perin be refused and his petition dismissed, and that he be condemned and decreed to pay all costs consequent thereon; and representing that there

is no property now remaining of the estate of said Ficklin, deceased, to be administered upon, save some one or two claims, out of which, in all probability, nothing will ever come into the hands of the curator; but solely with the view of protecting himself against any sinister designs of said McMicken, petitioner prays that your honor will appoint him curator of the said estate of said James H. Ficklin, deceased, and for all such further and other orders and decrees as law and justice demand, and that your honor may be pleased to grant.

JAS. L. STERLING.

Filed November 5th, 1844.

JAS. J. WEEMS, *Parish Judge.*

Filed 8th November, 1844.

CHAS. B. COLLINS, *Clerk.*

STATE OF LOUISIANA, *Parish of West Feliciana:*

Court of Probates, No. 335.

In the matter and things of the succession of James H. Ficklin, deceased, application of Franklin Perin for curatorship, James L. Sterling opposing, court in session November 18th, 1844. This cause came on for trial, when the opposition was submitted, and the court being of opinion that the same should not be sustained, the law and evidence being in favor of the applicant, Franklin Perin:

It is therefore ordered, adjudged, and decreed, that the application of James L. Sterling, filed in this case, be overruled. And it is further ordered and decreed, that Franklin Perin be appointed curator of the vacant estate of James H. Ficklin, deceased, and that letters as such curator issue in his favor, upon his complying with all the formalities of the law to entitle him to such letters, and that the costs be paid out of said succession.

JAS. J. WEEMS, *Parish Judge.*

November 18th, 1844.

STATE OF LOUISIANA, *Parish of West Feliciana:*

At a session of the court of probates, begun and holden in and for said parish, at the court-house of said parish, in the town of St. Francisville, on Monday the eighteenth day of November, (being the third Monday of said month,) in the year of our Lord one thousand eight hundred and forty-four.

Present, the honorable James J. Weems, parish judge of said parish, and ex-officio judge of the court of probates in and for the same.

The court opened in due form.

In the matters and things of the succession of Jas. H. Ficklin, deceased, application of Franklin Perin, for letters of curatorship, vs. JAMES L. STERLING, opposing. } No. 335.

Set for trial for to-day.

This cause came on for trial, when the opposition was submitted, and the court being of opinion that the same should not be sustained, the law and evidence being in favor of the applicant, Franklin Perin.

It is therefore ordered, adjudged, and decreed, that the opposition of James L. Sterling, filed in this case, be overruled; and it is further ordered and decreed, that Franklin Perin be appointed curator of the vacant estate of James H. Ficklin, deceased, and that letters as such curator issue in his favor upon his complying with all the formalities of the law to entitle him to such letters, and that the costs be paid out of said succession.

STATE OF LOUISIANA, *Parish of West Feliciana:*

*Court of Probates, Clerk's Office.*

I, Charles B. Collins, clerk of the court of probates, in and for the parish and State aforesaid, do hereby certify, that the foregoing three pages, together with this, contain a full, faithful, and true transcript of the records and proceedings, together with all the evidence adduced on the trial of the case, of the opposition of James L. Sterling to the application of Franklin Perin, for letters of curatorship in the vacant estate of James H. Ficklin, deceased, No. 335, as the same now remain on file in the said court.

In testimony whereof I have hereunto signed my name and affixed the seal of said court, at St. Francisville, this 21st day of January, in the year A. D. 1845, and the 69 year of the independence of the United States.

[L. S.]

(Signed) CHAS. B. COLLINS, *Clerk.*

STATE OF LOUISIANA, *Parish of West Feliciana:*

Court of Probates.

I, James J. Weems, parish judge of said parish and State, and ex-officio judge of probates in and for the same, do hereby certify, that Charles B. Collins, who signed the foregoing certificate, is the clerk of the court of probates, and was so at the time of signing said certificate; and that full faith and credit are due to his acts as such, and that the foregoing certificate is in due form of law.

Witness my signature and seal official, this 21st day of January, A. D. 1845.

[L. S.]

(Signed) JAS. J. WEEMS, *Parish Judge.*

STATE OF LOUISIANA, *Parish of West Feliciana:*

To all whom these presents shall come, greeting:

Whereas Franklin Perin has been duly and legally appointed, on the day of the date hereof, by the judge of the court of probates of the said parish, curator of the vacant estate of James H. Ficklin, late of the parish and State aforesaid, deceased, and has taken the oath and given the bond and security required by law.

Now these presents are to make it known, that the said Franklin Perin is authorized and empowered to act as curator of the vacant estate of

James H. Ficklin, deceased, and to do and perform as such curator as aforesaid, and for the interest of the said estate, all the duties imposed upon him by law.

Given under my signature and seal official, this eighteenth day of No-
[L. S.] vember, A. D. one thousand eight hundred and forty-four.

JAS. J. WEEMS,
*Parish judge and ex-officio judge of the court of probates.*

STATE OF LOUISIANA, *Parish of West Feliciana:*

Be it remembered, that on this eighteenth day of November, in the year of our Lord one thousand eight hundred and forty-four, I, James J. Weems, parish judge of said parish, and ex-officio notary public in and for the same, have attended at my office, in the town of St. Francisville, in said parish and State, for the purpose of making, and I, said judge and ex-officio notary public, did then and there, at the request of Franklin Perin, of the city of New Orleans, in said State, proceed to make a public estimative descriptive inventory and appraisement of all the property, moveable and immoveable, belonging to the vacant succession of James H. Ficklin, late of said parish and State, deceased, situated in said parish; and I, said judge and ex-officio notary public, appointed Joseph A. Patterson and Frederick E. Mayo, male residents of said parish and State, over the age of twenty-one years, experts and appraisers to value and appraise the effects belonging to said succession, who are now present, and have taken and subscribed the following oath, justly and impartially to discharge and perform the duties devolving on them as such, to wit:

THE STATE OF LOUISIANA, *Parish of West Feliciana:*

We, Joseph A. Patterson and Frederick E. Mayo, the above named experts and appraisers, having been first duly sworn according to law by the undersigned authority, do make oath that we will justly and impartially discharge and perform all and singular the duties incumbent on us as experts and appraisers of the property belonging to the succession of James H. Ficklin, late of said parish and State, deceased, so help us God.

J. A. PATTERSON,
F. E. MAYO.

Sworn to and subscribed before me, this 18th day of November, A. D. 1844.

JAS. J. WEEMS, *Parish Judge.*

And Isaac N. Maynard and John M. Glaze, male residents of said parish of West Feliciana, over the age of twenty-one years, have attended and sign hereto as witnesses.

The following is a true process verbal of this inventory, to wit:

One judgment against James J. Weems for the sum of one thousand and sixteen dollars and forty-nine cents, in favor of said estate, was appraised to be worth the sum of one thousand sixteen dollars forty-nine cents, $1,016 49. Total inventory amounting to the sum of one thousand sixteen dollars forty-nine cents.

And there being no other property shewn to be inventoried, therefore I, said judge and ex-officio notary public, do now close this inventory, amounting to the sum of one thousand sixteen dollars and forty-nine cents; and the said Joseph A. Patterson and Frederick E. Mayo, the above named appraisers, sign hereto, in presence of and with me, said judge and ex-officio notary public; and Nathaniel Bowman, attorney for absent heirs of said James H. Ficklin, deceased, is present and sign this act.

In testimony of all which, I sign these presents, under my signature and seal official, this said 18th day of November, 1844.

All done in the presence of Isaac N. Maynard and John M. Glaze, the above named witnesses, who sign hereto.

J. A. PATTERSON,
F. E. MAYO,
N. BOWMAN,
*Attorney for Absent Heirs.*

Witnesses.—J. N. MAYNARD,
JOHN M. GLAZE.

*Jas. J. Weems, parish judge.*

To the honorable James J. Weems, judge of the parish court, and ex-officio judge of the court of probates, in and for the parish of West Feliciana, State of Louisiana, the petition of Franklin Perin, curator of the vacant estate of the late James H. Ficklin, deceased, respectfully represents:

That the annexed account contains a final and conclusive statement of the affairs of the deceased, as they came to the charge of your petitioner; that after diligent search and inquiry, no more property could be found belonging to the said estate, and no other creditors have presented their claims, than those contained in the said account.

That the estate is insolvent, and that the annexed account, when homologated, forms a complete and final settlement of the same, and requires no further services of a curator.

Wherefore, your petitioner prays that the said account be filed, and after due public notice, the same be homologated, and the funds in the hands of the petitioner be paid accordingly, and that your petitioner may be discharged, as curator, from any further action in and about the said succession of James H. Ficklin, deceased. And he will ever pray, &c.

F. PERIN.

Filed December 13th, 1844.

JAS. J. WEEMS, *Parish Judge.*

Let notice be given of this application and filing of this account as the law directs.

JAS. J. WEEMS, *Parish Judge.*

*December 13th*, 1844.

CR.

To amount of money received of J. J. Weems, a former curator of the succession, against whom a judgment was rendered for that amount in favor of John Barcley, a successor to the said Weems in this curatorship, in the parish court for the parish of West Feliciana, as the only property belonging to the succession - - - - - - $1,016 49

James H. Ficklin, dec'd,
By Franklin Perin, curator, DR.

*Privilege claims.*

| | | |
|---|---|---|
| To J. J. Weems, parish judge of said parish, for his fees in this curatorship - - | $32 12 | |
| To fee of Bowman, attorney for absent heirs | 10 00 | |
| To commission of two and a half per cent. on the appraisement of property belonging to the succession, for F. Perin, curator - | 25 40 | |
| To the Bayo Sara Ledger for publication - | 6 50 | |
| Total of privileged charges - | | $74 02 |

To Charles McMicken, to amount of a judgment rendered in favor of said McMicken, against John Barcley, curator of said estate, on the 30th of March, 1839, in the parish court for the parish of West *of* Feliciana: 1st, For the sum of $608 32, being the balance of open account between the deceased and said McMicken, with interest thereon from the 31st March, 1824, at the rate of ten per cent. per annum till paid, which amounts, on the 30th Dec'r, 1844, to the sum of - - - - 1,870 58½

2d. For the sum of $4,866 93, founded upon a promissory note, dated September 20th, 1817, payable to McMicken & Ficklin on the 1st March, 1819, signed by James H. Ficklin, Jed. Smith and Amos Webb, with interest at the rate of ten per cent. per annum from the 1st March, 1819, till paid, which amounts, on the 1st January, 1845, to the sum of - 15,006 60

FRANKLIN PERIN, *Curator.*

Filed December 13th, 1844.

JAS. J. WEEMS, *Parish Judge.*

*Court of probates.*

*State of Louisiana, parish of West Feliciana:*

The within account having been examined by this court, and found supported by legal vouchers, and it appearing to the satisfaction of this court, that due and legal notices of the filing of this account has been given for more than ten days anterior to this date, and no opposition having been made thereto, it is therefore ordered, adjudged, and decreed, that the said account be passed and homologated, and made the judgment of this court; and that Franklin Perin be discharged as curator from any further action and responsibility in and about the succession of James H. Ficklin, dec'd.

JAS. J. WEEMS, *Parish Judge.*

*December 24th*, 1844.

*New Orleans, January 7th*, 1845.

Received of Franklin Perin, curator of the estate of James H. Ficklin, deceased, nine hundred and forty-two dollars forty-seven cents, the same being the amount decreed to be paid me by a judgment of the probate court for the parish of West Feliciana, of date the day of December, A. D. 1844, homologating the final account of the said Perin in said estate, filed in the probate court aforesaid on the 13th December, 1844, which sum is to be credited on a judgment in my favor against the estate of James H. Ficklin, deceased, bearing date the 30th of March, 1839, in the probate court for the parish of West Feliciana, in accordance with the terms of the said judgment, that is, to the credit of that part of said judgment which is based on the open account of $608 32, with interest from 30th March, 1824, at the rate of ten per cent. per annum till paid.

C. McMICKEN.

*State of Louisiana, parish of West Feliciana:*

I, James J. Weems, judge of said parish, and ex-officio judge of the court of probates in and for the same, do hereby certify, that the foregoing, commencing on the fifth page hereof, and ending on this, contains a full, true, and complete transcript of all the proceedings had, and now of record and file in my office, relative to the matter and things of the succession of James H. Ficklin, deceased, and final settlement of the same had before me, by Franklin Perin, as curator of said succession. And that I have no clerk.

In testimony of all which, I have hereunto affixed my official [SEAL.] signature and seal, this 21st day of January, A. D. 1845.

(Signed) JAS. J. WEEMS, *Parish Judge.*

*United States of America, State of Louisiana:*

By Alexander Mouton, Governor of the State of Louisiana.

These are to certify, that Jas. J. Weems, whose name is subscribed to the instrument of writing hereto annexed, is, and was at the time of his signing the same, parish judge, in and for the parish of West Feli-

ciana, State of Louisiana, and that all his official acts as such, are entitled to full faith and credit.

Given at New Orleans, under my hand and the seal of the State, this thirty-first day of January, one thousand eight hundred and [L. S.] forty-five, and of the independence of the United States the sixty-ninth.

(Signed) A. MOUTON.

By the Governor:

(Signed) ROBERT CARTER NICHOLAS,
*Secretary of State.*

The following testimony was offered in evidence by the defendants:

*Deposition of Andrew Skillman.*

The deposition of Andrew Skillman, taken before Henry Hinch, one of the justices of the peace in and for the parish of West Feliciana, State of Louisiana, on the 20th day of June, 1843, at the clerk's office of the district court of said parish, in the town of St. Francisville, in said parish, to be read as evidence in a certain suit now pending in the circuit court of the United States for the eastern district of Louisiana, holding sessions at New Orleans, wherein Charles McMicken is plaintiff, and Amos Webb and others are defendants.

The said deponent being first carefully examined, cautioned, and sworn to tell the whole truth, doth depose and say, that he lives at a greater distance than one hundred miles from the city of New Orleans, where the said court is holden; and to the several interrogatories propounded in this case, and which are hereto annexed, the said deponent makes the following answers thereunto:

*To the first he answers*, "He has known the parties in the foregoing suit since the year 1817. Has known them in the parish of West Feliciana. Deponent did know Dr. Ira Smith, in the parish of West Feliciana, since the year 1819."

*To the second interrogatory he answers*, "He was one of the executors of the estate of James H. Ficklin, deceased, and qualified as such, and acted in that capacity about twelve months."

To the 3d interrogatory he answers, "He knew of the partnership of McMicken & Ficklin, in the early part of 1817. That immediately after that partnership was dissolved, said Ficklin and witness entered into partnership. That Ficklin died, as witness thinks, on the 6th or 7th of November, 1817. When Ficklin died, he left a will, and named Jedediah Smith, David Flower, and witness as executors. Witness qualified and acted rather more than twelve months. Did not renew. Settled his executorship. Made an advertisement for creditors to bring in their claims previous to his settlement with the probate judge. The advertisement was dated 15th of February, 1819, and the settlement was made on the 15th of April following. He has no recollection of the note sued on having ever been presented to him for payment during his administration of said estate. Says that he does not know, of his

own knowledge, what became of the books and papers of the co-partnership of Mr. McMicken & Ficklin, though believes that they were kept by plaintiff. They never came into witnesses possession. None of the debts of said partnership ever came into witnesses possession. Believes that plaintiff attended to the collection. Does not know the extent of said debts. Does not know whether said co-partnership done a large business. Believes that they done as much as any other country store. Does not know how much outstanding debts they had at the dissolution of the partnership. They sold on a credit. He thinks a merchant doing the extent of business that they did for two years, might have outstanding debts to the amount of $10,000 at the end of two years. That he entered into co-partnership in September, 1817. That at that time of the year, the sale of merchants here are due on first January following. At the time just before spoken of, J. & B. Smith were doing, as witness thinks, the most extensive business. That some short time afterwards, they sold very extensively, say as far as to $80,000 per year. That if the customers of McMicken & Ficklin were the same who dealt with witness and Ficklin, some of them were very unprofitable ones. That he thinks there were much more goods brought into this place immediately after witness commenced business, than had been before. The goods taken by Ficklin, of McMicken & Ficklin, came into the partnership of Ficklin and witness. Witness thinks they were unsaleable goods, being many of them remnants. They were inventoried at about $9,000, but does not think they were worth it. That McMicken never made any application to witness, as executor of Ficklin, to settle the co-partnership affairs of McMicken & Ficklin. Thinks that if McMicken & Ficklin had done business at the time they did, only two years, that they would have much more than the ten thousand dollars as spoken of, they stopping at the season of the year they did; but if they had continued longer, and followed up their collections, they would not have as much. It is usual in settling co-partnership affairs, that one partner is entrusted to settle up the affairs, who gives to the other security for his faithful performance. That the other party giving security to provide funds for one-half of any deficit there might be of funds in the settling partner's hands, to pay the whole debts due by the firm. That should the settling partner afterwards show, that he had paid debts due by the firm to a greater amount than the funds left in his hands, he would have the right to call on the other to pay or refund his proportion of said overplus. So far as witness knew of Fickles, which was not long, he considered him a prudent discreet man in business.

To the 4th interrogatory he answers, "He believes that McMicken did take the books and accounts of the firm for settlement, and that he never did, during the executorship of witness, settle the affairs of said firm with witness, or offer to do so, to the recollection of witness. He never did converse with witness on the subject, to the recollection of witness.

To the 5th interrogatory he answers, "That the said McMicken never did demand the payment of said note from witness. Witness did advertise for all the creditors of said estate to come forward and exhibit their claims. McMicken was at St. Francisville part of the time of the executorship of witness. McMicken must have known of witness being executor, and must have known that he had advertised to the creditors, and of the settlement and homologation of the accounts of witness' executorship.

To the 6th interrogatory he answers, "That he has already stated the customs and practice of the time in regard to winding up partnerships.

To the 7th interrogatory he answers, "That interrogatory is already answered.

To the 8th interrogatory he answers, "He has a knowledge of Ficklin's having drawn two drafts in part payment of said goods on Flower & Finley, of New Orleans, in favor of McMicken, one for the sum of three thousand dollars, and the other for the sum of upwards of eighteen hundred dollars; and he believes that the amount of said drafts *were* given in part payment of the stock of goods that Ficklin took at the dissolution. These two drafts were afterwards paid by witness out of the partnership funds of Ficklin and witness, and taken up by witness and filed in the district court of this parish in the suit of Weems, involving the final settlement of the partnership concerns of Ficklin and witness, search for which has been made to-day for the drafts in the clerks' offices, but they could not be found."

To the 9th interrogatory he answers, "He has seen the note on which this suit is founded, and he believes that it is in the handwriting of McMicken. Witness believes that said note was handed to him by Ficklin, with a request that he (witness) would hand it to defendant, Webb, for his endorsement; and, at the same time, a letter from Ficklin to Webb on the subject, requesting his endorsement, which witness delivered."

To the 10th interrogatory he answers, "He says that McMicken is a keen, shrewd man."

To the 1st cross interrogatory he answers, "His name is Andrew Skillman, aged fifty-four years, and resides in the parish of West Feliciana, and his employment is that of a planter. Witness has no interest, direct or indirect, in the event of this suit; has no relation with any of the defendants except Doctor Smith and Mrs. Smith, and Mrs. Smith's children; this relationship is by marriage with a first cousin of Mrs. Smith."

To the 2d cross interrogatory he answers, "He knows of no settlement between McMicken & Ficklin, nor between McMicken and the defendants. Witness has spoken of two settlements himself, as executor of Ficklin, and of the concern of Ficklin and witness, both of which are matters of record in the parish."

To the 3d cross interrogatory he says, " He has never made any settlement with the plaintiff touching the Ficklin estate."

To the 4th interrogatory he answers, "He has made no statement of any settlement made by the plaintiff with any person."

To the 5th cross interrogatory he answers, "He says that the precise date of the drafts he does not recollect. He has already mentioned the amounts of the drafts, as well as he recollects; they were given in consideration of goods bought by Ficklin of McMicken & Ficklin, and that shows their correction with the note."

To the 6th cross interrogatory he answers, "He knows nothing further."

(Signed,) ANDREW SKILLMAN.

Testimony of Clark Woodruff, extracted from a record and read in evidence.

Clark Woodruff sworn, says, he came to reside here in 1811; that James H. Ficklin was here, and understood to be a partner of a firm then here; thinks Jos. Gray & Co., the firm, was considered to be in good credit; does not recollect when McMicken & Ficklin went into partnership, though witness was here, thinks it was after the campaigne of 1815, though not positive; they appeared to do a good business, though witness had not particular knowledge of their business; Mr. Ficklin died in the fall of 1817, thinks October or November of that year; that he, witness, was appointed curator of estate of Ficklin in the fall of 1819, and renewed letters of curatorship three times, and in May 1823, for the last; that he thinks suit was brought on the note sued on, before he was appointed curator; there were three suits, one against the executors of Ficklin, one against the endorsers, and one against Jedediah Smith and Amos Webb; those suits were brought by Thos. Walker & Co., and perhaps one or more of them were in the name of McMicken & Ficklin, to use of Thos. Walker & Co.; that he, witness, was the attorney who brought those suits; that the original note sued on, now shewn to witness, he recognises to be the same note on which he brought the three suits, as before stated; that the copy of the record in the note No. 1087, filed with the plea of res judicata, he believes to be the copy of said note; that he recognises the aforesaid note to be the one placed in his hands by Thos. Walker & Co., as theirs, for collection.

Then the court adjourned until to-morrow morning at 9 o'clock.

*Saturday morning, May 15th*, 1830.

The court met pursuant to adjournment. C. Woodruff proceeds, says, that during the time he was curator of Ficklin, there was some consideration between plaintiff and witness about the settlement of the partnership accounts of McMicken & Ficklin; thinks that application was made to settle by witness, to plaintiff, who expressed no objection; that there were appointed, referees by plaintiff and witness once, who were irregularly appointed and nothing resulted from it; witness understood, in his conversation with plaintiff, that the plaintiff was settling the business, and at one time stated to witness there were several of the debts he had not collected; when referees met the books were pro-

duced by plaintiff, in which he, plaintiff, had made entries; but one of the referees not being satisfied, as he had no means to obtain correct information, left the room, when the referees broke up; witness has rendered his account as curator of Ficklin to the probate judge; shew a balance of about $3,000, in his hands; there remains a dispute with present curator in said account of one item in the account of $500, which, if not allowed by the probate court as a credit, will leave a balance of about $3,500; does not know positively the consideration (of the note here sued,) from Walker to McMicken for said note; though recollects of a sale of merchandise by the former to the latter; that Jed. Smith resided in this parish from 1817, up to his death in the summer of 1824; thinks that plaintiff has been here and New Orleans, about six months in every year, from 1817 to this time."

Cross-examined, says, that the paper shown him, being a petition of Thomas Walker to the probate court, shewing Thos. Walker & Co. as a large creditor of the estate of James H. Ficklin, is in his, witnesses, handwriting; that the claim thereon set forth is the same note now sued on; that 17th April, 1821, the witness believed plaintiff able to pay the amount of the note sued on, for he always considered him able to pay it as well before as after that date; that this note was part of a larger amount he was collecting of plaintiff for Tennant of Baltimore; that Mr. Micken paid witness part, and settled with said Tennant; that McLanahan & Bangard, of New Orleans, were agents for Tennant; that they, the agents, gave plaintiff an order to witness to deliver up several notes to plaintiff, and thinks the note sued on was one of them, though not positive; Tennant was assignee of T. Walker & Co.; that the suit of Thomas Walker & Co. vs. C. McMicken, was, during its pendency, or afterwards, assigned or transferred by Walker & Co. to T. Tennant; that the plaintiff in this suit settled the judgment rendered in said suit with Tennant; witness always understood when the subject of the settlement of the partnership of McMicken & Ficklin was spoken of; that plaintiff pressed the payment of the note here sued on, and witness objected.

Opinion of the supreme court of the State of Louisiana, in the case of McMicken vs. Ficklin's curator, as reported in the 11th vol. of Louisiana reports, page 313. Bullard, J., delivered the opinion of the court:

The facts disclosed in this case appear to be, that the plaintiff and Ficklin, the defendant's intestate, were partners in trade; that the partnership was dissolved in September, 1817, by mutual agreement. By the same agreement McMicken was put in possession of all the books, notes, and accounts, with full power to collect and settle all dues and demands owing to said firm, and, when in funds sufficient, to pay off all debts due by the firm. Ficklin took all the goods on hand at an advance of five per cent., and paid to his partner one-half the price in drafts on a commercial house in New Orleans, and for the other half gave his note, with J. Smith and A. Webb his sureties, in solido, pay-

able to McMicken & Ficklin, on the 1st of March, 1819, amounting to four thousand eight hundred and sixty-six dollars and ninety-three and a half cents.

The object of the present suit is to recover of the estate of Ficklin, 1st, the amount of the promissory note last mentioned on the allegation, that it was erroneously made payable to the firm instead of the plaintiff; and 2nd, such balance as may be found due to the plaintiff, on the final settlement of the partnership concern, which, he alleges, amounts to the further sum of five thousand dollars.

We shall consider the different branches of the case in the order in which they have been stated:

1st. In regard to the promissory note of Ficklin, Smith & Webb, the allegation that it was made payable in error to McMicken & Ficklin, is negatived by all the evidence in the record. It was given for the price of the stock of goods which belonged to the firm, and of which, consequently, an undivided half belonged to Ficklin himself; the other half was paid to the plaintiff. According to the pretensions of the plaintiff, he would be entitled to the whole of the stock in trade, with an advance of five per cent., and Ficklin to nothing. If the goods had been sold to a stranger, each partner would have been entitled to one-half the price; and we cannot conceive how the case is altered, when one of the partners becomes the purchaser. Undoubtedly, if the plaintiff, who remained as liquidator of the concern, could shew that he had paid debts of the firm beyond the amount of the notes and accounts, which were placed in his hands for that purpose, he would be authorized to recover such an amount as would equalize the profits or losses between the partners. In that event, Ficklin's estate would be bound to refund or to pay the whole or a part of the note in question. Nothing authorizes us to presume that the partnership made no profits, and it is in the power of the plaintiff alone to shew the amount of debts which he has paid; he became the mandatory of his partner on the dissolution of the firm, and it does not appear that he has rendered any account of his gestion.

The auditors say in their report, that the note in question was, on the day of its maturity, charged on their books in account to McMicken, and thereby became his individual property. This charge must have been made long after the dissolution of the partnership, while the books were under the exclusive control of McMicken, and consequently is not evidence against Ficklin. But, according to the same report, the whole debit of McMicken, including interest, amounts only to six thousand four hundred and thirty-four dollars and nineteen cents; whereas, if he had charged himself with the sum received from Flower & Finley, on account of the stock of goods sold to Ficklin, and the note in dispute, those two items alone would have amounted to upwards of nine thousand dollars. The auditors further say, that the acceptances mentioned were cashed, and disposed of to the use of the firm, but it is not shown in what manner they were disposed of, nor what debts were paid out of that fund. Auditors are appointed to state the respective accounts of parties, and they are bound to do so with sufficient precision and min-

uteness, to enable the court to judge whether they acted correctly in rejecting or in allowing the articles in the accounts.—Code of Practice, 455.

Their opinion, therefore, as to the liability of Ficklin's estate to pay the note in question, is not conclusive.

2nd. With respect to the unsettled accounts of the firm, we have already intimated an opinion, that the plaintiff cannot recover anything, without rendering an account of his agency as liquidator. He is chargeable with the notes and accounts put into his hands, except so far as he can show his inability to collect them. He is chargeable with the amount of Flower & Finley's acceptances, representing half the stock of goods; and he is further chargeable with any amount he may have received during the existence of the firm. He is to be credited with the amount of debts which he may shew he has paid out of any funds in his hands, and with his advances, according to the partnership agreement. Ficklin's estate is chargeable with one half the stock of goods, as shown by his note, and with any amount which he may have withdrawn from the concern during its existence, to be credited by any advances which he may have made. Neither the reports of the auditors, nor the evidence in the record, enables us to decide finally between the parties, and to strike a balance, without the hazard of injustice to one or the other of them. The books alone are not evidence against the defendant of any transactions since the dissolution of the firm; under these circumstances, as the case must be remanded, we think ourselves called on to express our opinion on some incidental questions to which our attention has been called.

We concur with the court below, in the opinion, that it was not necessary to make the attorney of absent heirs a party in the first instance; and, consequently, that the suit was correctly dismissed as relates to him.

The plea of prescription was properly overruled. At a former term of the Supreme Court the case was remanded, in order to enable the plaintiff to show that prescription had been interrupted. This is now abundantly shown in the record.

It is therefore ordered, adjudged and decreed, that the judgment of the court of probates be annulled, avoided and reversed, the report of the auditors set aside, and that the case be remanded for further proceedings according to law; the plaintiff paying the costs of this appeal.

The following testimony was read in evidence on the trial of this case.

Interrogatories to be propounded to Joseph Ficklin, and other witnesses residing at Lexington, Fayette county, State of Kentucky, under a commission issued out of the circuit court of the United States for the 9th circuit of the eastern district of Louisiana, in a certain suit pending said court, wherein Charles McMicken is plaintiff, and Amos Webb and others are defendants.

Interrogatory first. What is your name, age, occupation, and place of residence?

2nd. Do you know the plaintiff, Charles McMicken; if yea, how long

have you known him; was he or not as you know, and have any, and what reason to believe, in partnership in the years 1815, 1816 and 1817, with the late Jas. H. Ficklin?

3rd. Is or is not the witness, Joseph Ficklin, a brother of the late Jas. H. Ficklin, who died at St. Francisville some time in the year 1817; and are or are not the wives of the witnesses sisters of the said James H. Ficklin?

4th. Have or not you, the said Joseph Ficklin, the brother, and your sisters, of the deceased James H. Ficklin, or either of them, retained their interests as heirs or legatees of the deceased, in the estate of said deceased; or have you, they, or either of them, transferred or assigned the same, or any part thereof?

5th. If said interests, or any part thereof, or the interest of any one of the said parties, have been transferred or assigned, please state to whom they have been so transferred or assigned, and for what consideration or sum of money; and at what time and place said transfers or assignments were made?

Interrogatory 6th. As brother or sisters of the deceased, were they or not legatees under the last will and testament of said Joseph H. Ficklin, deceased, a copy of which is herewith exhibited?

Interrogatory 7th. If there be anything within your knowledge touching said interests, assignments, or transfer, please state the same fully and particularly, as if specially interrogated in relation thereto.

Signed, GEO. EUSTIS,
*Of counsel for def't.*

Submitted. And no cross interrogatories.
Signed, G. B. DUNCAN,
*Att'y for Pl'ffs.*

On the 16th day of Dec'r, 1839, the following commission was issued:

Circuit court of the United States for the ninth judicial circuit, holding sessions in and for the eastern district of Louisiana, to James E. Davis, city judge of Lexington, or James L. Hickman, or any other justice of the peace of Fayette county, state of Kentucky:

Know ye, that reposing special trust and confidence in your integrity and ability, we hereby authorize and require you that you call, and cause to come before you, witnesses, and them duly examine on oath, touching and concerning certain matters and things in a cause now depending in the said court, wherein Charles McMicken is plaintiff, and Amos Webb and others are defendants; and the same examinations, so taken and reduced to writing, you certify under your hand and seal, and send enclosed to this court without delay, to be read in evidence on the trial of said cause; and send also this writ.

Witness the honorable Roger B. Taney, chief justice of the Supreme Court of the United States, this 16th day of December, anno domini 1839, and the 64th year of the independence of the United States of America. DUNCAN N. HENNEN, *Clerk.*
Signed, By A. PIERSE, *Dy. Clerk.*

*Answers to the foregoing interrogatories.*

The deposition of Joseph Ficklin, taken at the post office in Lexington, Kentucky, on the 25th day of February, 1841, to be used as evidence in a case now pending in the circuit court of the United States for the ninth judicial district of Louisiana, wherein Charles McMicken is plaintiff, and Amos Webb and others, defendants; this deponent being of lawful age, and first duly sworn, deposeth and saith, in answer to interrogatories propounded.

1st. Interrogatory first. He answers that his name is Joseph Ficklin, aged about sixty-five years; occupation is postmaster, in the city of Lexington, State of Kentucky, where his residence is.

2nd. Interrogatory second. He answers that he knows the plaintiff, Charles McMicken; saw him, for the first time, about the year 1821; he believes a copartnership was entered into between him and the late James H. Ficklin in the year 1815, and was dissolved in the year 1817.

3rd. Interrogatory third. He answers—the witness, Joseph Ficklin, is a brother of the late James H. Ficklin, who died at St. Francisville some time in the year 1817.

4th. Interrogatory fourth. He answers that he is the only surviving brother, and Jane Grooms the only surviving sister, of the deceased James H. Ficklin; they have retained their interests as heirs and legatees of the deceased in the estate of the deceased. I have not, nor has any other of the heirs or legatees to my knowledge, ever transferred or assigned their interest, or any part thereof, in and to the estate of James H. Ficklin, deceased. The power of attorney made by this deponent and his sister, Jane Grooms, and her husband, Horatio Grooms, in the summer of 1838, to John Barcley, Joseph R. Thomas, and others therein named, with a view to facilitate the settlement of said estate, and which he believes has been put upon record in the office of the parish judge for the parish of West Feliciana, in the State of Louisiana; and a reference to the same, will explain all that which has been done to the knowledge of this deponent.

5th. Interrogatory fifth. He answers—he knows of no interests, or any part thereof, ever belonging to any of the heirs or legatees, ever having been transferred or assigned, or otherwise disposed of.

6th. Interrogatory sixth. He answers—if the copy exhibited be a true and correct copy of the last will and testament of James H. Ficklin, deceased, his parents and brothers and sisters therein named *is* correctly stated; since then his parents have died; also two brothers and two sisters, namely, John H. Ficklin, leaving, as he believes, five or six children, William Ficklin, leaving two children, Philadelphia Bradley, leaving eight children, and Margaret Piper, leaving six children, to inherit their respective estates.

7th. Interrogatory seventh. He answers—he has not transferred or assigned his interest, or any part thereof, as heir or legatee; nor does he know or believe that any one of the heirs or legatees of said James H. Ficklin, deceased, have sold, assigned, transferred, or otherwise disposed

of their interests, or any part thereof, to said Ficklin's estate. This deponent has not at this time, or does he believe he ever had, any authority, from any one of the heirs or legatees, to sell or dispose of any part of their interest to the estate of the said James H. Ficklin, deceased.

Having now given my answers to the foregoing interrogatories propounded, it is proper that I should state more fully the circumstances attending at the time of giving the power of attorney referred to in my answer to the 4th interrogatory. The said Charles McMicken called on this deponent in Lexington, Kentucky, in 1838, and in a conversation stated that a sum of money belonging to the estate of James H. Ficklin was in the hands of James J. Weems, curator of said estate, which he, as principal or only creditor, had not been able to obtain; and he believed a power of attorney from the heirs and legatees of said estate would enable them to bring said Weems to a settlement.

This deponent stated, on reply, that he had long since abandoned all expectations of receiving anything for himself from said estate; but this deponent remarked, his sister, Jane Grooms, and some of the children of his deceased sisters, Philadelphia Bradley and Margaret Piper, were poor, and, as he, McMicken, was rich, this deponent proposed that he should give to them a portion of the sum he might receive from the said Weems—the amount proposed not now recollected; but some days after this conversation it occurred to this deponent that a smaller sum in hand would be of more advantage to the parties than a larger and uncertain sum proposed to come when a settlement with the curator of the estate took place, and therefore this deponent agreed to accept from said McMicken two hundred dollars, as a present for said children; and this deponent divided the sum as follows: $100 to Aswell Piper, Lucy Piper, and Margaret J. Piper, of Allen county, Kentucky, who are the children of his sister, Margaret Piper; and the other $100 he divided equally between J. F. Bradley and Polly Kent, children of his deceased sister, P. Bradley. I was also under an impression then that said McMicken had given to my sister, Jane Grooms, $100; but I have heard since that on his visit to my sister, residing in another county, he only gave her $50, as a present, with a promise of a further present of $50 more when received from Weems.

In referring to a deposition which this deponent made on the 6th of May, 1840, before D. Bradford, esq., he finds the following in his answers to the 7th and last interrogatory: "and therefore he proposed to said McMicken that he would transfer to him all interest in said estate of his brother for the sum of $300, to be divided between his sister, Jane Grooms, and the other most needy of his relations; to this proposal the said McMicken agreed, and had prepared by a notary public an instrument, which this deponent signed, &c."

Although this extract may be considered true, it admits of a construction, as regards a sale by this deponent, which the conversation at the time between the said McMicken and this deponent does not warrant.

The answer in this deposition is therefore more full, as relates to tha

conversation, in which this deponent recollects that the said McMicken spoke of the funds of the estate of James H. Ficklin in the hands of curator Weems, which was not sufficient to satisfy the claim of the said McMicken; and that any sum he paid to this deponent, for the use of the legatees or heirs, was in fact a present to them, and so much loss to him, which he preferred to do rather than the funds of the estate should remain where it was in the hands of the curator. The instrument which this deponent signed, which he then and still considers a power of attorney to John Barcley and others, is again referred to, and should be glad it could accompany this paper. And further this deponent saith not.

(Signed) JOSEPH FICKLIN.

*State of Kentucky, Fayette county, set:*

I, James L. Hickman, one of the commonwealth justices of the peace in and for the county aforesaid, duly commissioned, sworn, and acting as such, and by law and by virtue of my said commission one of the justices of the county court of said county, and acting as such, do certify, that in pursuance of the annexed commission I caused the abovenamed Joseph Ficklin, the deponent in the foregoing deposition, to come before me, at the time and place in the caption stated, who being by me carefully examined, cautioned, and sworn in due form of law, then and there propounded to said deponent the annexed interrogatories; and said deponent's answers to each interrogatory were wholly reduced to writing by Mr. John P. Fulwiler, the private clerk of said deponent, by his request and in his presence; and that said deponent then and there, in my presence, subscribed the same; that I am not counsel or attorney for either of the parties, or interested in the result of the cause. All of which is hereby certified to the court, as directed by said commission hereunto annexed.

Given under my hand and seal, in the city of Lexington, Kentucky, this 25th day of February, 1841.

(Signed) JAMES L. HICKMAN,
*J. P. F. C.* [SEAL.]

*Last will and testament of James H. Ficklin.*

No. 37.—Ne varietur.

In the name of God, amen! I, James H. Ficklin, being of good mind, but in bad health in body, do ordain this my last will and testament, revoking all others. To my God and creator I resign my soul and body, praying him to treat each as it may deserve; to my worthy and respectable father, Thomas Ficklin, and mother, Mary Ficklin, I give and bequeathe, each, the sum of one hundred dollars, for purposes of buying remembrances of their son; to my brothers, John H. Ficklin, William Ficklin, and my sisters, Philadelphia Bradley and Margaret Piper, I give and bequeathe the sum of five hundred dollars each; to my sister Jane Grooms, I give and bequeath the sum of one thousand dollars; and to my worthy brother Joseph Ficklin, I give all and singular the balance of my estate.

Whereas, I am at this moment engaged in a co-partnership as a merchant, with Andrew Skillman, as merchant; and whereas I, in con-

junction with him, *I* owe some debts; and whereas in my own responsibility I owe some debts, I do hereby desire that the co-partnership at present existing under the firm of Ficklin & Skillman, should continue until 1st January, eighteen hundred and nineteen, and that none of the legacies before bequeathed shall be paid before; *and* which time my *execution* hereafter mentioned, shall have three months to pay every legacy before mentioned, and that they do it faithfully as possible is my intention. I appoint, as executors to this my last will, Jedediah Smith, David Flower, and Andrew Skillman, and beg them to do their duty.

Dated St. Francisville, 27th October, 1817.

JAMES H. FICKLIN.

Signed by the testator, in presence of Robert C. Wederstrandt, John Vanlear, junr,, Norist Wright, John F. Finley, John Smith, Frederick Williams, Darias S. Johnston.

*State of Louisiana, parish of Feliciana:*

Be it remembered, that, on this eighth day of November, in the year of our Lord one thousand eight hundred and seventeen, before me, John H. Johnston, parish judge, acting as judge of probates in and for the parish of Feliciana, State of Louisiana, personally came and appeared Robert C. Wederstrandt, John Vanlear, jr., Norrist Wright, John Smith, Frederick Williams, and Darius Johnston, subscribing witnesses to the foregoing will, who, being duly sworn on the holy evangelist of Almighty God, depose and say, that each and every of them saw James H. Ficklin, of the parish aforesaid, now deceased, sign the said testament with his own hand, and heard him declare that the same contained his last will and testament; that, at the request of the said James H. Ficklin, they, the appearers aforesaid, in the presence of each other, and in that of the said James H. Ficklin, *dec'd*, subscribed their names to the said last will as witnesses; that they, each and every of them, recognise their said signatures, as well as that of the deceased, to the said last will and testament. Deponents further say, that they verily believe, that at the time the said James H. Ficklin signed the said last will and testament, he was of perfect mind and sound memory.

In testimony whereof, the appearers aforesaid, each and every of them, subscribe their names hereunto, with me, the said judge, and in presence of John Meed, John H. Mills, assisting witnesses.

Witness my signature, and the parish seal, the day of above date, and forty-second year of American independence.

ROBERT C. WEDERSTRANDT,
JOHN VANLEAR, Junr.,
NORRIST WRIGHT,
FRED'K WILLIAMS,
JOHN SMITH,
DARIUS S. JOHNSTON.

Witness: JOHN H. MILLS,
JOHN MEED.

JOHN. H. JOHNSON, [L. S.]
*Parish judge of Feliciana.*

*State of Louisiana, parish of West Feliciana:*

I, John Bennett Dawson, parish judge of said parish of West Feliciana, do hereby certify, that the foregoing copy of the last will and testament of James H. Ficklin, deceased, to be a true and correct copy, from probate record A, pages 352 and 353, in my office.

Given under my hand, and seal official, this 30th January, 1840.

[L. S.]

Interrogatories to be propounded to Wm. D. Boyle, a witness to be examined on behalf of the defendants, in the suit in which the annexed commission is issued, to wit: of Charles McMicken against Amos Webb and others, now pending in the circuit court of the United States for the eastern district of Louisiana.

1st. What is your name, age, place of residence, and occupation, or profession?

2nd. Are you acquainted with the brother and sisters of the late James H. Ficklin, who died in St. Francisville, in the year 1817, or thereabouts?

3rd. Are they, or not, interested in the succession of said James H. Ficklin, as heirs or legatees? If they are, state in what manner.

4th. Have they, or not, transferred their interest or trust; either of them transferred his or her interest in said succession? If yea, to whom, and for what consideration was said transfer made, and how do you derive your knowledge touching the same?

5th. Has or not a transfer or assignment of said interest in said succession been made to the plaintiff in this suit? If said transfer is in writing, where have you seen the same? State the purport thereof.

6th. What declarations have you heard the plaintiff, Charles McMicken, make, touching the transfer of the interests of the said brother and sisters of said deceased James H. Ficklin in his said succession? State when and where, and in whose presence, said declarations were made.

Cross-interrogatories.

1st. Will you state whether or not you have any interest in the event of this suit, or whether you are counsel for any of the defendants therein.

2nd. Whether you are related to, or connected with, any of the defendants? If aye, with which of them, and in what degree.

3rd. If you speak of any transfer, as intimated by the interrogatories in chief, and the same be in writing, annex it to your answers, and say whether or not you know the signatures to the same to be genuine; and say how you know that fact.

4th. If you speak of any declarations of the plaintiff, mention when and where the same were made, and under what particular circumstances, and why they were made.

5th. If you answer the sixth interrogatory affirmatively, be pleased to be very particular in detailing all the circumstances connected with

any such supposed declarations; mention the precise expressions, if you can recall them; and state why you are enabled *them* to be thus circumstantial in remembering and stating those particular expressions.

6th. If you say that any person or persons was or were interested in the estate of James H. Ficklin, state how you know that fact, and whether said person or persons has or have been recognised as the brother, sisters, heirs, or legatees of said Ficklin; and, if recognised, by whom recognised.

7th. Is not the sum and substance of all you know in this matter derived from hearsay; or at least from what you have incidentally heard, but without any positive or personal knowledge on the subject? Be pleased to distinguish all that you have heard from all that you know personally.

Signed, L. C. DUNCAN,
*Attorney for the plaintiff.*

The following commission issued 9th November, 1840.

Circuit court of the United States for the ninth judicial circuit, holding sessions in and for the eastern district of Louisiana, to any judge or justice of the peace in the State of Louisiana:

Know ye, that reposing special trust and confidence in your integrity and ability, we hereby authorize and require you that you call, and cause to come before you, certain witnesses, and them duly examine on oath, touching and concerning certain matters and things in a cause now depending in the said court, wherein Charles McMicken is the plaintiff, and Amos Webb and others are defendants; and the same examinations, so taken and reduced to writing, you certify, under your hand and seal, and send enclosed to this court without delay, to be read in evidence on the trial of said cause; and send also this writ.

Witness the honorable Roger B. Taney, chief justice of the Supreme Court of the United States, at the city of New Orleans, this 9th day of November, anno domini 1840, and the 65th year of the independence of the United States of America.

[SEAL.] Signed, DUNCAN N. HENNEN,
*Clerk.*

*Depositions of William D. Boyle, in answer to the foregoing interrogatories, &c.*

*State of Louisiana, parish of East Feliciana:*

Be it remembered, that, on this twenty-first day of November, in the year of our Lord one thousand eight hundred and forty, at the request of the attorney of the defendants, and by virtue of a commission issuing out of the circuit court of the United States for the ninth judicial district, holding sessions in and for the eastern district of Louisiana, directed to any judge or justice of the peace in the State of Louisiana, authorizing and requiring said judge or justice of the peace to call, and cause to come before him, certain witnesses, and them duly to examine on oath, touching and concerning certain matters and things in a cause now de-

pending in the said court, wherein Charles McMicken is the plaintiff, and Amos Webb and others are defendants; and the same examinations, so to be taken, to be reduced to writing, and certified, under the hand and seal of said judge or justice of the peace, and by him to be sent enclosed to said court, without delay, to be read in evidence on the trial of said cause, together with said writ.

I, Isaac Johnson, judge of the third judicial district court of the State of Louisiana, now holding sessions at Clinton, in the parish of East Feliciana in said district, did cause to come before me William D. Boyle, esq., a witness in behalf of the defendants in said suit, and duly examined him, under oath, touching and concerning the matters and things in the interrogatories and cross-interrogatories submitted in said cause; and to the first interrogatory he answers—

1st. His name is William D. Boyle, age thirty-five years, place of residence the parish of West Feliciana, Louisiana, his occupation or profession that of an attorney at law.

2nd. To the second interrogatory he answers, he is not.

3rd. To the third he answers, he knows nothing of his own knowledge.

4th. To the fourth he answers, "That Charles McMicken, within the last two years, informed him that the heirs of James H. Ficklin had transferred to him all their interest in the succession of said J. H. Ficklin; knows not for what consideration, as the said McMicken did not mention the same."

5th. To the fifth interrogatory "he answers, knows nothing of any transfer, but what he derived from conversation with McMicken. Has never seen any transfer; knows nothing of its purport, but what he has already mentioned as derived from McMicken."

6th. To the sixth "he answers, that he heard the said McMicken say, that the heirs of Ficklin had transferred all their interest in the succession to him; does not recollect precisely when this conversation occurred, except as before stated; it was in the town of St. Francisville, in whose presence, if in that of any one, he does not recollect."

To the cross-interrogatories he answers as follows:

1st. To the first he says, he has no interest in the event of this suit, nor is he of counsel for any of the defendants."

2nd. To the second, he says he is not connected or related with any of the defendants; his wife is third cousin to the daughter of Jedediah Smith.

3rd. To the third he says, that knowing nothing of the matter but what he derived from the above mentioned conversation with McMicken, he deems it unnecessary to make further reply.

4th. To the fourth he answers, that he has already replied in his answer to the sixth interrogatory as to the time and place; he recollects no circumstance connected with the conversation, except that Charles McMicken stated to him that, in virtue of the transfer from the heirs of Ficklin, he had some idea of bringing suit against the college of Lou-

isiana, at Jackson, for a parcel of land in the possession of said college, which he stated belonged in reality to the heirs of Ficklin.

5th. In answer to the fifth, can state nothing further than is to be found in his reply to the fourth.

6th. To the sixth he says, that he knows nothing but what he has already stated, except from the records of the probate court of West Feliciana, which he does not deem proper or necessary to speak of.

7th. To the seventh cross-interrogatory he says, that he knows nothing of the matter, but from the statements of C. McMicken, and that he has been careful to state nothing but what he heard from the said McMicken.

Signed, WILLIAM D. BOYLE.

Sworn to, and subscribed, before me, this 21st November, 1840.

Signed, ISAAC JOHNSTON,
*Judge 3rd district.*

And having reduced the answers of said witness to said interrogatories and cross interrogatories to writing, I caused him to sign the same in my presence, and swore him to the truth of the same, and send the same back to said court, certified under my hand and private seal, and herewith annex the commission and interrogatories, and send the same enclosed to the clerk of said court, according to law.

In testimony of all which I hereby sign my name, and seal the same with my private seal.

(Signed) ISAAC JOHNSON, [SEAL.]
*Judge 3rd district.*

21st November, 1840.

*Interrogatories to be propounded to John Barcley and others.*

Circuit court of the U. S., E. dist. of La.

CHARLES MCMICKEN,
vs.
AMOS WEBB, ANN SMITH & IRA SMITH, et als.

Interrogatories propounded on behalf of the plaintiff to John Barcley and others, residing at St Francisville, Louisiana.

1st. Are you acquainted with the parties to this suit, or with either of them? If aye, how long have you been acquainted with them, and each of them?

2nd. What is your profession or business; how long have you been so engaged, and where?

3rd. Have you been intimately acquainted with the plaintiff, and if so, how long? Has your acquaintance been personal or professional?

4th. Do you know who are the heirs of the late James H. Ficklin? If aye, state how many there are, their name, and where they and each of them reside, as far as you know.

5th. Have you ever been the legal adviser of the plaintiff in this case?

If so, for how long a time? Have you ever heard him speak on the subject of this suit? Have you ever heard him speak of having purchased the interests of the heirs of said Ficklin in his succession? Has your relation with the plaintiff been such, professionally, or otherwise, that he would in all probability have so informed you, if such had been the fact?

6th. Are you now acting, or have you ever acted, as agent or att'y for any of the heirs of said Ficklin? If so, when, and which of the heirs? And state whether said plaintiff ever purchased the interest of the heirs so represented by you. Would you have known the fact, if said plaintiff had ever purchased the interest of said heirs, in the succession of said Ficklin? State all that you know upon this subject.

7th. Where was the succession of said Ficklin opened? State all that you know about the same, particularly its present situation; in whose possession it is. By whom and in what capacity it is administered; and whether any person has applied to be put in possession of the estate, either as heirs, or as representing the heirs? And if so, state whom and when.

8th. If there are any other matters of fact known to you, which might be of advantage to the plaintiff in this suit, and especially such as would tend to show that he has not purchased the rights, claims, or demands of the heirs of said Ficklin in and to the said succession, state the same as fully and particularly as if you had been thereunto specially interrogated.

(Signed) G. B. DUNCAN, *Atty. for plff.*

Legal exceptions reserved.

(Signed) E. EUSTIS, *for defts.*

The following commission was issued, 20th January, 1841:

Circuit court of the United States, for the ninth judicial circuit, holding sessions in and for the eastern district of Louisiana.

To any judge or justice of the peace, in the parish of East or West Feliciana:

Know ye, that reposing special trust and confidence in your integrity and ability, we hereby authorize and require you, that you call and cause to come before you certain witnesses, and them duly examined on oath, touching and concerning certain matters and things in a cause now depending in the said court, wherein Charles McMicken is plaintiff, and Amos Webb, et als., are defendants, and the same examinations, so taken and reduced to writing, you certify under your hand and seal, and send enclosed to this court without delay, to be read in evidence on the trial of said cause; and send also this writ.

Witness the honorable Roger B. Taney, chief justice of the Supreme Court of the United States, at the city of New Orleans, this 20th day of January, anno domini, 1841, and the 65th year of the independence of the United States of America.

[SEAL.] (Sig'd) DUNCAN N. HENNEN, *Clerk.*

*Answers to the foregoing interrogatories.*

STATE OF LOUISIANA, *Parish of West Feliciana:*

In virtue and by authority of the annexed commission from the circuit court of the United States, for the ninth judicial circuit, holding sessions in and for the eastern district of Louisiana, I, Henry Hinch, mayor of the town of St. Francisville, and a justice of the peace in and for the same, did cause to come before me, John Barcley, a witness to testify in a certain suit now pending in said court, wherein Charles McMicken is plaintiff, and Amos Webb and others are defendants, that the same may be read in evidence on the trial of said suit; he makes the following answers to the annexed interrogatories, propounded to him by the plaintiff in said suit.

1st. To the first interrogatory, "he answers, that he is acquainted with all the parties of the suit, (except Amos Webb,) for the last five or six years, and with the plaintiff much longer.

2nd. To the second interrogatory "he answers, that the last five or six years he has been engaged in the mercantile business, in this place and closing up the same, and settling estates to which he has been appointed to administer.

3rd. To the third interrogatory "he answers, that it has been many years since he first knew the plaintiff, but have been intimately acquainted with him the last five or six years, having acted as his agent in renting his houses, collecting rents, and other money due him, as well as other business; and from the plaintiff's residing with him, and his family generally, on his visits to this place.

4th. To the fourth interrogatory he answers—by the last will and testament of James H. Ficklin, dec'd, made a short time before his death, in 1817, his parents, three brothers, and three sisters, were his only legatees and heirs; since then, his parents, and two brothers and two sisters are deceased, leaving only Joseph Ficklin and Jane Grooms, the only surviving brother and sister; they reside in the State of Kentucky. The children of his deceased brothers, John H. Ficklin and William Ficklin, and the children of his deceased sisters, Philadelphia Bradley and Margaret Piper, are nineteen in number, and are the other heirs of said James H. Ficklin, dec'd, and they reside in the following named States, viz: seven of them in Kentucky, five in Indiana, two in Illinois, two in Missouri, one in Arkansas, one in Tennessee, and one in Mississippi.

5th. To the fifth interrogatory he answers, " That he has not been the legal adviser of the plaintiff—the law is not his profession; but have heard him frequently speak of the suit. Have never heard him speak of having purchased the interest of the heirs of said Ficklin in the succession. His intimate relation with the plaintiff has been such, that he would most certainly have so informed him if such had been the fact. In a conversation with the plaintiff about a year since, this deponent inquired of him if he had or would make a purchase of the heirs, or any of them, in the succession of said Ficklin, dec'd? He answered, he

had not or would not make any purchase, directly or indirectly, any interest any the heirs or legatees might have in said succession; for his claim on the estate of said Ficklin, dec'd, as a judgment creditor, was more than five times the amount of the whole value of said estate, and for him to purchase an insolvent estate like that, would be the height of folly and absurdity. He further said, he would not undertake to make a purchase of the interest of the heirs, who reside throughout near all the western and southern States, for a dozen such estates, or words to that effect.

6th. To the sixth interrogatory he answers, "That he now has a power of attorney from Joseph Ficklin and Jane Grooms, the only surviving brother and sister of Jas. H. Ficklin, deceased, with full power to act for them, and to sell and dispose of their interest in said estate. He knows the plaintiff has not purchased the interest of said Joseph Ficklin and Jane Grooms in said succession, so represented by this deponent.

7th. To the 7th interrogatory he answers, "That the succession of said Ficklin was opened in this place in the year 1817. This deponent was appointed curator of the vacant estate of James H. Ficklin, deceased, some time in the year 1839, and within the last year has received $2,250 from Jas. J. Weems, the late curator of said Ficklin's estate. That, with an undivided interest of a lot of ground in the town of St. Francisville, not exceeding $100 in value, is all the estate this deponent knows of. No person has applied to be put into possession of the estate, either as heirs, or as representing the heirs. The said estate is largely insolvent.

8th. To the eighth interrogatory he answers, "That for the last two years Joseph Ficklin has been desirous that a suit should be brought against the college of Louisiana, at Jackson, to recover 207 acres of land adjoining said town, upon which the college is erected, and which was sold in the year 1822, by Hugh W. Hill, a judge of probates, and as the property of the estate of James H. Ficklin, deceased, and purchased by Clark Woodruff, the then curator of said Ficklin's estate, at a price less than one-fourth of the appraised value at that time, believing said sale and purchase not being agreeable to law, and wishing to investigate said claim; and the plaintiff being somewhat acquainted with that transaction, and in the business generally, this deponent having employed William D. Boyle, in the spring of 1839, to attend to some little professional business, he requested the plaintiff to speak to said Boyle, and get his views and opinion about said claim, and the manner he would recommend or commence proceedings, if employed for the recovery of said property. The plaintiff shortly afterwards informed this deponent, that he had spoken to said Boyle on the subject of the claim, and asked his opinion on the propriety of the deponent bringing suit against the college of Louisiana, at Jackson, upon the power of attorney he had from some of the heirs of said Ficklin, dec'd; or if it would be necessary to have all the heirs joined in the suit. His reply was, that suit might be brought either way, but could not advise or say which would be the best way, and seemed to be at a great loss

on the subject. The plaintiff further observed to this deponent, that it was the first time he ever had spoken to said Boyle on professional business, and was quite disappointed at his apparently incapacity in matters of law, and that, in his opinion, was not a fit person to entrust such a suit with, and recommended this deponent to employ more able and experienced counsel to bring the suit.

From all the facts and circumstances within the knowledge of this deponent, he is certain that the plaintiff has not purchased the interest of any of the heirs or legatees to the succession of said James H. Ficklin, dec'd.

There being no more interrogatories to answer, now closes the same.

(Signed) JOHN BARCLEY.

I, Henry Hinch, mayor of the town of St. Francisville, and a justice of the peace in and for the same, do hereby certify, that the reason for taking the foregoing deposition is by virtue of the annexed commission, and the fact is, that the witness lives in St. Francisville, in the State of Louisiana, more than one hundred miles from New Orleans, State of Louisiana, the place of trial of this cause, for and in which said deposition is taken and is necessary.

I further certify, that on this fifteenth day of February, 1841, I was attended by the witness, who is of sound mind and lawful age, and the witness was by me carefully examined, and cautioned, and sworn, to testify the whole truth, and the deposition was by me reduced to writing, and after carefully reading the same to the witness, he subscribed the same in my presence. I have retained the said deposition in my possession for the purpose of sealing up, directing, and forwarding the same with my own hand to the court, for which the same was taken.

I further certify, that I am not of counsel or attorney to either of the parties in said deposition and caption named, or in any way interested in the event of said civil cause named in the caption.

In testimony whereof, I have hereunto set my hand and affixed [SEAL.] my private seal. Done at the town of St. Francisville, this 15th day of February, 1841.

(Signed) H. HINCH,
*Mayor of the town of St. Francisville, and justice of the peace in and for the same.*

*Deposition of Ira Smith.*—Filed March 2d, 1841.

*United States circuit court, eastern district of Louisiana.*

CHARLES MCMICKEN
vs.
AMOS WEBB et als.

*City of New Orleans, ss:*

Ira Smith being duly sworn, doth depose and say: that some time ago a commission was taken out in this suit, to take evidence at Lexington, Kentucky; that sufficient time has elapsed for the return of said com-

mission, but that nothing has been heard therefrom. The deponent is apprehensive that said commission may have been lost or mislaid, and deponent is desirous to take out a new commission in order to obtain the benefit of said testimony.

(Signed) IRA SMITH.

Subscribed and sworn to, this 2d March, 1841, before me.

(Signed) C. WATTS, *Judge*.

Interrogatories to be propounded to Joseph Ficklin and others, witnesses residing at Lexington, Fayette county, State of Kentucky, under a commission issued out of the circuit court of the United States, for the ninth circuit of the eastern district of Louisiana, on a certain suit pending in said court, wherein Charles McMicken is plaintiff, and Amos Webb and others are defendants.

Interrogatory 1st. What is your name, age, occupation, and place of residence?

2d. Do you know the plaintiff, Charles McMicken? If yea, how long have you known him? Was he or not, as you know or have any and what reason to believe, in partnership, in the years 1815, 1816, and 1817, with the late James H. Ficklin?

Int. 3d. Is or not the witness, Joseph Ficklin, a brother of the late Jas. H. Ficklin, who died at St. Francisville some time in the year 1817? and are or are not the wives of the witnesses sisters of the said James H. Ficklin?

4th. Have or not you, the said Joseph Ficklin, the brother, and your sisters, of the deceased James H. Ficklin, or either of them, retained their interests as heirs or legatees of the deceased, in the estate of said deceased? or have you, they, or either of them, transferred or assigned the same, or any part thereof?

5th. If said interest, or any part thereof, or the interest of any one of said parties, have been so transferred or assigned, please state to whom they have been so transferred or assigned, and for what consideration or some of money, and what time and place said transfers or assignments were made.

6th. As brother or sisters of the deceased, were they or not legatees under the last will and testament of the said Joseph H. Ficklin, dec'd, a copy of which is herewith exhibited?

7th. If there be any thing within your knowledge touching said interest, assignment, or transfer, please state the same fully and particularly, as if specially interrogated thereto.

8th. If in answer to any of the previous interrogatories, you state that the heirs of James H. Ficklin have parted with their rights to his succession, in what shape or manner did they do it? Was it or not in the form of a power of attorney to collect, receive, and settle the succession of the said James H. Ficklin? And if yea, for whose benefit was any thing that should be received from the said succession to be applied? Was it or not for the benefit of the heirs of James H. Ficklin, or for the benefit of the said Charles McMicken? Answer fully and particularly.

Int. 9th. If, in answer to the previous interrogatory, you state that a power of attorney was given as therein inquired about, to whom was the said power given? And was or was not the person or persons to whom the said power was given, authorized to confess a judgment against the succession of James H. Ficklin, or the heirs of James H. Ficklin, in favor of Chas. McMicken, or any other persons? And was or was not such a confession made to your knowledge? And if made, was it or was it not consistent with the purposes for which said power was given?

(Signed) GEO. EUSTIS,
*Attorney for Defendants.*

*Cross interrogatories.*

1st. Did James H. Ficklin die, leaving a father or mother surviving? How many brothers and sisters had he who survived them? What were their names, ages, places of residence time?

2d. Who are now the legal heirs of the late James Ficklin? What are their names, ages, and places of residence? Where have the said heirs resided for the last two or three years?

3d. If, in answer to any of the interrogatories in chief, you state that any of the heirs of James H. Ficklin have sold, transferred, or conveyed their interest in his estate, then state whether you state the fact from your own personal knowledge, or from facts derived from others; did you ever hear any of said heirs say that they had sold their interest in said estate? Do you know, of your own personal , of any of said heirs ever having transferred their interest? If so, were you present when such transfer was made? By whom was it made? When was it made? Where was it made? To whom was it made? What was the consideration paid? Was the transfer verbal or in writing?

Int. 4th. If you state that the transfer was by power of attorney, then annex a copy thereof. State by whom and in whose favor it was given. Did you sign it? What was its date, and where is it?

5th. If you should state that the power of attorney authorized the person or persons to whom it was given to confess a judgment in favor of Charles McMicken, state whether or not such confession did or did not apply solely to a claim which said McMicken had against the succession of said James H. Ficklin, then pending in the court of probates, in the parish of East Feliciana, in the State of Louisiana, which had been referred to referees, who had reported in favor of said McMicken.

(Signed) L. C. DUNCAN, *for Plaintiff.*

The following commission issued on 2d March, 1841:

*Circuit court of the United States, for the ninth judicial circuit, holding sessions in and for the eastern district of Louisiana.*

To any judge or justice of the peace in Lexington, Kentucky, or to James E. Davis and Daniel Bradford, at Lexington, Kentucky.

Know ye, that reposing special trust and confidence in your integrity and ability, we hereby authorize and require you, that you call and

cause to come before you certain witnesses, and them duly examine on oath, touching and concerning certain matters and things in a cause now depending in the said court, wherein Chas. McMicken is plaintiff, and Amos Webb et als. are defendants, and the same examinations, so taken and reduced to writing, you certify under your hand and seal, and send enclosed to this court without delay, to be read in evidence on the trial of said cause; and send also this writ.

Witness the honorable Roger B. Taney, chief justice of the Supreme Court of the United States, at the city of New Orleans, this 2d day of March, anno domini 1841, and 65th year of the independence of the United States of America.

(Signed) DUNCAN N. HENNEN, *Clerk*.

Proof of official capacity of the magistrate executing this commission waived.

(Signed) L. C. DUNCAN, *for Plff.*
IRA SMITH, *for Defts.*

3*d March*.

*Deposition of Joseph Ficklin.*

The deposition of Joseph Ficklin, taken at the post office in the city of Lexington, on the fifteenth day of March, 1841, to be read in evidence in a cause now pending in the circuit court of the United States for the ninth judicial district, holding sessions in and for the eastern district of Louisiana, wherein Charles McMicken is plaintiff, and Amos Webb and others are defendants.

This deponent being of lawful age, and first duly sworn, deposeth and saith, in answer to the annexed interrogatories:

Interrogatory 1st. He answers that his name is Joseph Ficklin, aged about sixty-five years, occupation is postmaster in the city of Lexington, State of Kentucky, where his residence is.

2d. He answers that he knows the plaintiff Charles McMicken. Saw him for the first time about the year 1821. He believes a co-partnership was entered into between him and the late James H. Ficklin, in the year 1815, and was dissolved in the year 1817.

3d. He answers, the witness, Joseph Ficklin, is a brother of the late James H. Ficklin, who died at St. Francisville some time in the year 1817.

4th. He answers that he is the only surviving brother, and Jane Grooms the only surviving sister, of the deceased James H. Ficklin. They have retained their interests as heirs and legatees of the deceased, in the estate of the deceased. I have not, nor has any other of the heirs or legatees to my knowledge, ever transferred or assigned their interest, or any part thereof, in and to the estate of Jas. H. Ficklin, deceased. The power of attorney made by this deponent, and his sister Jane Grooms, and her husband Horatio Grooms, in the summer 1838, to John Barcley, Joseph R. Thomas, and others therein named, with a view to facilitate the settlement of said estate, and which he believes

has been put upon record in the office of the parish judge, for the parish of West Feliciana, in the State of Louisiana, and a reference to the same will explain all that which has been done to the knowledge of this deponent.

5th. He answers, he knows of no interests, or any part thereof, ever belonging to any of the heirs or legatees, ever having been transferred or assigned, or otherwise disposed of.

6th. He answers that no copy of the will is exhibited.

7th. He answers, he has not transposed or assigned his interest, or any part thereof, as heir or legatee, nor does he know or believe that any one of the heirs or legatees of said James H. Ficklin, deceased, have sold, assigned, or transferred, or otherwise disposed of their interests, or any part thereof, to said Ficklin's estate.

Having now given my answers to the foregoing interrogatories as propounded, it is proper that I should state more fully the circumstances attending, at the time of giving the power of attorney referred to in my answer to the 4th interrogatory.

The said Charles McMicken called on the deponent, in Lexington, Kentucky, in 1838, and in conversation stated, that a sum of money belonging to the estate of James H. Ficklin was in the hands of James J. Weems, curator of said estate, which he as principle, or only creditor, had not been able to obtain; and he believed that a power of attorney from the heirs and legatees of said estate would enable them to bring said Weems to a settlement. This deponent stated in reply, that he had long since abandoned all expectations of receiving anything for himself from said estate; but this deponent remarked, his sister Jane Grooms, and some of the children of his deceased sisters Philadelphia Bradley and Margaret Piper, were poor, and as he, McMicken, was rich, this deponent proposed that he should give to them a portion of the sum he might receive from said Weems. The amount proposed not now recollected, but some days after this conversation it occurred to this deponent that a smaller sum in hand would be of more advantage to the parties than a large and uncertain sum, proposed to come when a settlement with the curator of the estate took place, and therefore this deponent agreed to accept from said McMicken two hundred dollars as a present for said children, and this deponent divided the same as follows: $100 to Oswald Piper, Lucy Piper, and Margaret J. Piper, of Allen county, Kentucky, who are the children of his sister Margaret Piper; and the other $100 he divided equally J. F. Bradley and Polly Kent, children of his deceased sister P. Bradley. I was also under an impression then, that said McMicken had given to my sister, Jane Grooms, 100 dollars, but I have heard since that on his visit to my sister, residing in another county, he only gave her $50 as a present, with a promise of a further present of $50 more when recovered from Weems.

This deponent has not at this time, or does he believe he ever had, any authority from any of the heirs or legatees, to sell or dispose of any part of their interest to the estate of James H. Ficklin, deceased.

In referring to a deposition which this deponent made on the 6th of

May, 1840, before Daniel Bradford, esq., he finds the following in his answer to the 7th and last interrogatory: "And therefore he proposed to said McMicken, that he would transfer to him all interest in said estate of his brother for the sum of 300 dollars, to be divided between his sister Jane Grooms and the other most needy of his relations; to this proposal the said McMicken agreed, and had prepared by a notary public an instrument, which this deponent signed," &c.

Although this extract may be considered true, it admits of a construction as regards a sale by this deponent, which the conversation at the time, between the said McMicken and this deponent, does not warrant. The answer in this deposition is therefore more full as relates to that conversation, in which this deponent recollects that the said McMicken spoke of the funds of the estate of J. H. Ficklin in the hands of curator Weems, which was not sufficient to satisfy the claim of the said McMicken, and that any sum he paid to this deponent for the use of the legatees or heirs, was in fact a present to them, and so much loss to him, which he preferred to do rather than the funds of the estate should remain where it was in the hands of the curator; the instrument which deponent signed, which he then and still considers a power of attorney to John Barcley and others, is again referred to, and should be glad it could accompany this paper.

Int. 8th. He answers and states, in addition to what he has stated in his answers to the fourth and seventh interrogatories of this deposition, that the instrument given by this deponent, which he considered a power of attorney, to John Barclay and others, contained, as he supposed and believed, an authority to collect the funds in the hands of the curator Weems, which were to be for the benefit of said Charles McMicken, and not of the heirs of said James H. Ficklin; and said Charles McMicken did name the persons to whom said power of attorney was given by this deponent, and he handed to this deponent the $200 for the use of his nieces and nephews as herein stated.

9th He answers, that the power of attorney already referred to as given by this deponent, was prepared solely by the direction of said McMicken, and so little of it is recollected by this deponent, that he is unable to speak of its provisions, whether it authorized the attorneys therein named to confess judgment or not. The impression of this deponent at the time of giving said power of attorney was, that it authorized the persons therein named to collect the sum due from the said curator Weems, as also all sums due by other persons in the State of Louisiana.

*Answers to cross-interrogatories.*

1st. He answers, that his brother, James H. Ficklin, died leaving a father and mother, three brothers, William Ficklin, John H. Ficklin, and Joseph Ficklin; and two sisters, Margaret Piper and Jane Grooms survived the father of the deceased James H. Ficklin, and John H. Ficklin died before his mother. The father and mother resided, at the time of the death of James H. Ficklin, in the county of Scott, Ken-

tucky, and were at the time of their death about eighty-four years of age; William Ficklin resided in the State of Illinois, and was at the time of his death about seventy years of age; John H. Ficklin resided and died in Scott county, Kentucky, at the age of about fifty-six; Margaret Piper resided and died in the State of Illinois, at about the age of sixty years; the age of this deponent is sixty-five, and the age of his sister Jane Grooms is about fifty-two; she resides in Todd county, Kentucky.

Cross-int. 2d. Joseph Ficklin and Jane Grooms are the only survivors of the brothers and sisters of James H. Ficklin, deceased; William Ficklin, deceased, the eldest, has left a widow and one son in the State of Illinois; P. Bradley, the next eldest, died about 16 years ago, leaving 7 or 8 children, who are now supposed to reside in the State of Arkansas, Missouri, Indiana, and Kentucky; John H. Ficklin, the next eldest, died soon after his sister Bradley, leaving six or seven children, who now are supposed to reside in Arkansas, Missouri, Indiana, and I believe in Kentucky; Margaret Piper, next eldest, died in the State of Illinois, leaving six or seven children, who are now supposed to reside in the State of Mississippi, Illinois, and Kentucky; Jane Grooms resides in Todd county, State of Kentucky, and has he supposed two children.

3rd. He answers that this cross-interrogatory is fully answered in the fourth and seventh interrogatory of this deponent.

4th. He answers that he has no copy of the power of attorney referred to in this deposition, and is unable to procure a copy fully certified; said power of attorney was dated some time in the summer of 1838, was signed by this deponent, and is said to be on record in the parish of Feliciana, Louisiana.

Cross-int. 5. He answers that he recollects too little of the contents of said power of attorney to pretend to give a particular description of its provisions, and again refers to the parish of Feliciana where this deponent understands a copy is on record; and further this deponent saith nothing.

(Sig'd) JOSEPH FICKLIN.

STATE OF KENTUCKY, *Fayette county, sct:*

In obedience to the annexed commission, I, Dan'l Bradford, a justice of the peace in and for the county and State aforesaid, residing in Lexington, did on this 15th day of March, 1841, cause to come before me, at the post office in the city of Lexington, Joseph Ficklin, who did then and there depose to and sign the foregoing deposition, for the purpose mentioned in the caption.

Given under my hand and seal this said 15th day of March, 1841.

DAN. BRADFORD, *J. P.* [L. S.]

Interrogatories on the part of the plaintiff to be propounded to Joseph Ficklin and other witnesses residing at Lexington, Kentucky, and to be answered under oath, in virtue of the annexed commission, which interrogatories, with the answers to be thereto made, the plaintiff will offer in evidence on the trial of this cause.

1st. Will you state whether or not you are acquainted with the parties to this suit; and how long you have known them, or either of them.

2nd. Are you or not a brother of the late James H. Ficklin, who died in St. Francisville, Louisiana, in the year 1817? Who were the heirs or legatees of said Ficklin at the period of his death? Name them, and mention the place of their residence; state whether they are all now living, and where they reside; mention if you can the names of those who have died since 1817, and where they died; and the names of the surviving heirs of those who are deceased, and their residences.

3rd. Have you ever sold, assigned, or transferred your interest in said estate of your brother, James H. Ficklin, to any person or persons? If aye, when, where, to whom, and for what price? If no money was paid, and you say you made any transfer, or sale, or assignment, state how you were paid or satisfied.

4th. Do you or not know whether any or all the other heirs of James H. Ficklin ever sold, or authorized any sale of, their respective individual interests in the estate of said James H. Ficklin? If you answer affirmatively, state all the particulars within your own knowledge; mention how many heirs so sold or transferred their said interest; when, to whom, and for what price.

5th. Whether or not you, or any of the other heirs or legatees of James H. Ficklin, ever executed any power of attorney to John Barcley and others, living in Louisiana, to settle the estate of James H. Ficklin, and particularly to recover your interest therein from the curator of said estate, or whoever might have the charge thereof. If aye, state whether you have been advised that said power of attorney was accepted and acted upon; and if acted upon, whether you have ratified and confirmed what was done in virtue of that power.

Int. 6th. Do you know any other matter or thing which you suppose would benefit the plaintiff? If aye, state the same as fully and particularly as if you had been thereto specially interrogated.

(Sig'd) L. C. DUNCAN, *for the plaintiff.*

*Cross-interrogatories.*

Cross-int. 1st. If in answer to any of the previous interrogatories you state, that the heirs of James H. Ficklin have parted with their rights to his succession, in what manner and form did they do it? Was it or not in the form of a power of attorney to collect and settle the effects of the succession of the said James H. Ficklin? For whose benefit should it be received, and to whose benefit should it be applied? Was it or not for the benefit of the heirs of James H. Ficklin, or for the benefit of Charles McMicken, the plaintiff?

2nd. If in answer to any of the previous interrogatories you state, that a power of attorney was given as therein enquired about, to whom was the power given? Was or not the person or persons, to whom said power was given, authorized to confess a judgment against the succession of the said James H. Ficklin, or the heirs of James H. Ficklin, in favor of said Charles McMicken? And was or not such a confession

made to your knowledge? And if made, was it or not consistent with the purposes for which said power was given?

(Sig'd) G. EUSTIS.

And on the 3d day of March, 1841, the following commission was issued, to wit:

Circuit court of the United States, for the ninth judicial circuit, holding sessions in and for the eastern district of Louisiana. To James E. Davis or Daniel Bradford, or either of them, or to any judge or justice of the peace in Fayette county, Kentucky:

Know ye, that reposing special trust and confidence in your integrity and ability, we hereby authorize and require you, that you call and cause to come before you certain witnesses, and them duly examine on oath, touching and concerning certain matters and things, in a cause now depending in the said court, wherein Charles McMicken is the plaintiff, and Amos Webb et als. are defendants; and the same examinations, so taken and reduced to writing, you certify under your hand and seal, and send enclosed to this court without delay, to be read in evidence on the trial of said cause, and send also this writ.

Witness the honorable Roger B. Taney, chief justice of the Supreme Court of the United States, at the city of New Orleans, this 3d day of March, anno domini 1841, and the 65th year of the independence of the United States of America.

[SEAL.] DUNCAN N. HENNEN, *Clerk*.

Proof of the official character of the magistrate executing this commission is waived.

(Sig'd] L. C. DUNCAN, *for pl'ff*.
" IRA SMITH, *for def'ts*.

3d March, 1841.

*Answers to the foregoing interrogatories.*

STATE OF KENTUCKY, *Fayette county, sct:*

In virtue and by authority of the annexed commission from the circuit court of the United States, for the 9th judicial circuit, holding sessions in and for the eastern district of Louisiana.

I, James L. Hickman, one of the commonwealth justices of the peace in and for the county aforesaid, did cause to come before me, on the 27th day of March, 1841, at the post office in the city of Lexington, Kentucky, Joseph Ficklin, to testify in a certain suit now pending in said court, wherein Charles McMicken is plaintiff, and Amos Webb and others are defendants, that the same may be read in evidence on the trial of said suit. The said Ficklin being of lawful age, and first carefully examined, and cautioned, and sworn, to tell the whole truth, makes the following answers to the annexed interrogatories, propounded by the parties to said suit.

Int. 1st. "He answers, that he knows the plaintiff Charles McMicken; saw him for the first time about the year 1821, and not since that time till the year 1838; he is slightly acquainted with Amos Webb and Ira Smith, two of the defendants."

2nd. "He answers, that he is the only surviving brother of the late James H. Ficklin, who died in St. Francisville in the year 1817. The heirs and legatees of James H. Ficklin, at the time of his death, were his parents Thomas Ficklin, and Mary Ficklin, and his three brothers William Ficklin, John H. Ficklin, and Joseph Ficklin, this deponent, and his three sisters Philadelphia Bradley, Margaret Piper, and Jane Grooms. There are none of said heirs or legatees living, except Jane Grooms, who lives in Todd county, Kentucky, and Joseph Ficklin, this deponent who resides in the city of Lexington, Kentucky; his parents, Thomas and Mary Ficklin, resided in Scott county, and the said Thomas died in Scott, and the said Mary Ficklin died in Harrison county, Kentucky, while on a visit in said county; William Ficklin resided and died in the State of Illinois. John H. Ficklin resided and died in Scott county, in the State of Kentucky; Philadelphia Bradley resided and died in Franklin county, Kentucky; Margaret Piper resided and died in the State of Illinois. The names of the surviving children, being heirs of those who are deceased, and their residence, are: Orlando B. Ficklin, the only son of William Ficklin, deceased, residing in the State of Illinois, the four surviving children being heirs of John H Ficklin, dec'd. William Ficklin and Benjamin Ficklin, residing in the State of Missouri; and John H. Ficklin, residing in the State of Arkansas; and Jane Smith, residing in the State of Indiana. The seven children now living, being heirs of Philadelphia Bradley, dec'd, are William Bradley, of Harrison county, Ky.; Jephtha Bradley, of Scott county, Kentucky; Henry Bradley, Margaret Huddleson, and Mary Kent, residing in the State of Indiana; James F. Bradley, residing in the State of Missouri; and Leland J. Bradley, residing in the State of Tennessee. The six surviving children and heirs of Margaret Piper, dec'd, are Philadelphia Mitchell, Lucy Piper, Oswald Piper, and Margaret J. Piper, all residing in Allen county, Kentucky; Beverly Piper, residing in Crawford county, State of Illinois; Ira Piper, residing in the State of Mississippi. There are also other heirs to the estate of James H. Ficklin, dec'd; the names of all those are not now recollected; they are the grand children of John H. Ficklin, dec'd; some of them are by the name of Lindsay, living in Arkansas and Missouri; the children of John Bradley, dec'd, and son of Philadelphia Bradley, dec'd, living in Franklin county, in the State of Kentucky; and five or six children of Edward Piper, dec'd, and son of Margaret Piper, dec'd, living in the State of Indiana; these grand children amount to 12 or 16 in number, but their names are unknown to this deponent, further than above stated; the above are the whole of the heirs and legatees of James H. Ficklin, deceased.

3d. "He answers, that he never has sold, assigned, or transferred his interest, or any part thereof, in the estate or succession of James H. Ficklin, deceased, to any person or persons whomsoever; all that this deponent has done touching the matters of said estate is, that he made and executed a power of attorney, jointly with his sister, Jane Grooms, and her husband, Horatio Grooms, to John Barcley and others

living in Louisiana. This power was given in the summer of 1838, a copy of which is hereunto annexed, and is made by this deponent part of his answer to this interrogatory, and which copy he believes to be a true and correct one."

4th. "He answers, that he has no knowledge that any one of the heirs or legatees of James H. Ficklin, deceased, have sold, assigned, or transferred, or have authorized any sale, assignment, or transfer of their interest in the estate or succession of James H. Ficklin, deceased."

5th. "He answers, that he did make the power of attorney jointly with his sister, Jane Grooms, and her husband, Horatio Grooms, as set out in his answer to the 3d interrogatory; and whatever acts have been done in virtue of said power of attorney are approved of and confirmed by this deponent."

6th. "He answers, that he knows nothing more that would be of advantage to the plaintiff, except to extend and explain his answer more fully made in a former deposition, taken by the defendants on or about the 15th instant, in his answer to the 8th interrogatory, wherein he stated that the power of attorney contained, as he supposed and believed, authority to collect the funds in the hands of the curator Weems, which was to be for the benefit of Charles McMicken, and not for the heirs."

This deponent considered the said Charles McMicken the principal, and perhaps the only creditor of the estate of James H. Ficklin, deceased, and that the funds when collected would go to the said Charles McMicken as a creditor, and that the heirs would not receive anything out of said estate until the debts were paid. This deponent States that since giving his former deposition in this suit he has had the opportunity of examining the annexed copy of the power of attorney executed by this deponent and his sister.

This deponent states that he kept no copy of the said power, at the time of executing it, or of any letters written by him since on the subject, he is now *enabled* to speak with certainty of the matters in relation to said power of attorney, which was given by this deponent without leaving an impression on his mind of its provisions; because he had long since lost all expectations of receiving anything from said estate of James H. Ficklin, deceased.

*Answers to cross-interrogatories.*

Cross-interrogatory 1st. "He answers, that this interrogatory is fully answered in his answers to the preceding interrogatories, more particularly in the third and sixth interrogatories."

2d. "He answers, that this interrogatory is also fully answered in his answers to the preceding interrogatories, and more particularly in the third and sixth interrogatories, as will appear by reference to said answers, and a copy of the power of attorney enquired about and made part of said answers, for the authority it contains, for the confession of a judgment, and for other purposes; and further this deponent saith not; the words "*and legatees,*" near the conclusion of the answer to the

second interrogatory *interlined before signed;* also *children* in the preceding part of the same answer *interlined before signed;* also the word *thereto erased,* and the *words to the* substituted near the close of the answer to the sixth interrogatory.

(Signed) JOSEPH FICKLIN.

*State of Kentucky, Fayette county, sct:*

I, James L. Hickman, one of the commonwealth justices of the peace in and for the county aforesaid, duly commissioned, sworn, and acting as such, and by law and by virtue of my said commission, one of the justices of the county court of said county, and acting as such, do certify, that in virtue and by authority of the annexed commission from the circuit court of the United States for the 9th judicial circuit, holding sessions in and for the eastern district of Louisiana, I caused the abovenamed Joseph Ficklin, the deponent in the foregoing deposition, to come before me at the time and place stated in the caption thereof; that said witness was by me carefully examined, cautioned, and sworn, (as in the caption,) then and there to testify the whole truth; that the said deposition was wholly reduced to writing by me in the presence of said deponent, and that he then and there in my presence subscribed his name to the same; that I am not counsel or attorney for either of the parties, or interested in the event of the cause; all of which is hereby certified to said court.

Given under my hand and seal this 27th day of March, 1841.

(Signed) JAMES L. HICKMAN, *J. P. F. C.* [SEAL.]

*Power of attorney from Joseph Ficklin and others to John Barcley and others, referred to in answer to the third interrogatory.*

Know all men by these presents, that we, Joseph Ficklin and Jane Ficklin, the only surviving brother and sister, and heirs at law, of James H. Ficklin, late of Feliciana, State of Louisiana, and Horatio Grooms, husband of Jane Ficklin, now Jane Grooms, have made, constituted, and appointed, and by these presents do make, constitute, and appoint, John Barcley, Joseph R. Thomas, and Henry Perkins, of Louisiana, our true and lawful attorneys, hereby empowering each any one of our said attorneys as aforesaid, for us, and in our names, to sell and dispose of, and conveyances make, and to collect, by law or otherwise, all the property, real, personal, or mixed, effects, assets, all sums of money due upon notes, bonds, accounts, choses in action, belonging to or due to the estate of James H. Ficklin, late of Feliciana, State of Louisiana; and especially to recover and receive from James J. Weems, the present or late curator of said estate, all the property, moneys and effects, that have come or may come into his hands, belonging to said estate; and whereas suit is now pending in the court of probates of the parish of West Feliciana, Louisiana, wherein Charles McMicken is plaintiff, and James J. Weems, curator as aforesaid, is defendant, and known on the docket of said court by its number, 108, upon which suit judgment has been rendered by said court upon the award of Murdock McQueen and William Leake, referees, which said judgment has been appealed

from to the supreme court of Louisiana, and by said supreme court remanded, so that the said suit remains undecided. Now, being fully satisfied that the said award is just, this is further to authorize and empower our said attorneys, or either of them, as aforesaid, for us and in our names to appear in said court of probates, and to ratify and confirm the award aforesaid, and to do all other acts, by confession of judgment or otherwise, to secure the benefit of said award to the plaintiff, the said Charles McMicken, in said suit; and generally all and every other act or acts in the law whatsoever needful and necessary to be done, in and about the premises; for us and in our names to execute and perform, as fully and amply as we might or could do if personally present, with the attorneys, one or more under them or either of them, for the purpose aforesaid to make and constitute, and again at pleasure to revoke, hereby ratifying and confirming whatsoever our said attorneys or attorney shall lawfully do touching the premises.

In witness whereof, we have hereunto set our hands and affixed our seals, this twenty-seventh day of July, one thousand eight hundred and thirty-eight.

JOSEPH FICKLIN, [L. S.]
JANE GROOMS, [L. L.]
HORATIO GROOMS. [L. S.]

Witnesses for Joseph Ficklin:
J. P. FULWILER,
EPHRAIM EWING.

Witnesses as to Jane Grooms and Horatio Grooms:
H. WINGATE, *J. P.*
JAMES SHANNON, *J. P.*

*State of Kentucky, Franklin county, to wit:*

We, James Shannon and Henry Wingate, two of the acting justices of the peace in and for said county, this day came the within named Jane Grooms and Horatio Grooms, who subscribed and acknowledged the within and foregoing letter of attorney to be their act and deed for the purposes therein mentioned.

Given under our hands this 7th day of August, 1838.

JAMES SHANNON, *J. P.*
H. WINGATE, *J. P.*

*State of Kentucky, Fayette county, sct:*

Before us, James E. Davis and Daniel Bradford, two of the acting justices of the peace, in and for the county of Fayette, and State aforesaid, came Joseph Ficklin, who subscribed and acknowledged the within and foregoing power of attorney to be his act and deed for the purposes therein named.

Given under our hands this 8th day of August, 1838.

JAMES E. DAVIS, *J. P. F. C.*
DANIEL BRADFORD, *J. P. F. C.*

And on the 23d day of June, 1845, the following bills of exception were filed, to wit:

(No. 1.)

CHARLES McMICKEN, vs. WEBB et als. } No. 135.

Be it remembered, that on the trial of this cause, after argument, and before the jury had retired to deliberate on their verdict, the counsel for the defendants moved the court to instruct the jury as follows, and marked "A," to wit:

On the trial of this cause, defendants' counsel prayed the court to charge the jury:

1st. That as plaintiff had alleged that there was error in making the note sued on, drawn in favor of and payable to McMicken & Ficklin, and that said note ought properly to have been made in favor of Charles McMicken only, plaintiff could not recover without proving such error and mistake; and if no such error or mistake was proved, the verdict of the jury ought to be in favor of defendants; for, without such proof, McMicken alone could not recover on a note drawn in favor of McMicken & Ficklin.

2d. That if the jury were satisfied that Webb & Smith were originally only sureties, and that whatever consideration there was for the note passed between McMicken as one party, and Ficklin as the other party, that in such case, and express written contract on the part of sureties is to be strictly construed in their favor, and they could only be made liable on their contract in the form and manner in which they had entered into it; and no proof of any error or mistake, as between the principal parties to the contract, could make mere sureties liable beyond the terms of the contract, unless they were privy to and agreed to the same; and if plaintiff could only recover against the principal party to the contract sued on by shewing error or mistake in that contract, the verdict of the jury as regarded the sureties should be in their favor.

4th. That if the jury believed that the note sued on grew out of the settlement of the partnership affairs of McMicken & Ficklin, and was given provisionally in relation thereto, and that McMicken had charged himself with the settlement of the partnership affairs, that then McMicken cannot recover on this note without a final liquidation and settlement of the partnership affairs; and that if, under the circumstances aforesaid, McMicken persists in submitting the suit on this note to the decision of the jury, their verdict ought to be for the defendant.

5th. That if the jury believed that the note sued on was given to attend on a settlement and liquidation of the partnership affairs of McMicken & Ficklin, and McMicken charged himself with the liquidation and settlement of the partnership affairs of McMicken & Ficklin, and that McMicken has received partnership assets sufficient to pay the

debts of the partnership, that in such case plaintiff McMicken ought not to recover, and the verdict of the jury ought to be for the defendants.

6th. That if the jury believed that Ficklin was a partner of the house of McMicken & Ficklin, which persons to whom the note was payable, and that the said house has long since been dissolved, and that the same Ficklin was principal debtor, and Amos Webb and Jed. Smith were only sureties in the note sued on, that these facts created a confusion of the characters of creditor and debtor; and whenever such event happened there was a payment of the note to the extent of the correlative characters of debtor and creditor, which in this case was one-half.

7th. That if the jury believed that the note sued on was given in pursuance of the terms of the dissolution of partnership between McMicken & Ficklin, and under an implied agreement that if the debts due to the partnership were not sufficient to pay the debts due by the partnership, then Ficklin and his sureties were to make good and sup-
[P & aquet, 103] ply one-half of the deficiency, and that McMicken charged himself with the liquidation of the partnership affairs in 1817, and that McMicken had not rendered an account of such liquidation before bringing this suit, it was competent for the jury to say that there was such a laches, neglect and default on his part as discharged the sureties.

Additional charge prayed for on behalf of defendants.

2094, *C. C.*

"A debtor in solido, whether surety or not, may plead all exceptions resulting from the nature of the obligation, as well as all such as are personal to himself, and common to all the debtors;" to which the plaintiff, by his counsel, objected, except the first charge asked for; but the judge, notwithstanding said objection, did instruct the jury as prayed for by defendants; to which the plaintiff, by his counsel, excepted at the time thereof; and prays that said instructions, being in writing, and hereto annexed, marked "A," may be made part of this bill of exceptions; and that the same be signed, sealed, and made part of the record in this case; which is done.

(Signed) THEO. H. McCALEB, [SEAL.]
*U. S. Judge.*

(No. 2.)

CHARLES McMICKEN, vs. WEBB et als. } No. 135.

Be it remembered, that on the trial of this cause, after argument, and before the jury had retired to deliberate upon their verdict, the plaintiff moved the court, among other instructions, to instruct the jury as follows:

4th. That the defendants to this suit, having bound themselves, in solido, cannot claim the right, or oblige the plaintiff, to discuss the property of Ficklin or his succession.—(C. C. art. 3015, and 3016.)

No. 7. That the obligation sued on is absolutely one for the payment of money; and that there is no shewing that the obligors, Smith & Webb, did undertake only to pay a balance which might be made to appear as due to McMicken on a settlement of the partnership of McMicken & Ficklin.

Which the judge refused; and thereupon the plaintiff, by his counsel, excepted to said opinion of the judge, and his refusal to give said instruction, and prayed the judge to sign and seal this bill of exceptions, and file the same as part of the record in this case; which is done.

*Remark by the judge.*

The court, in refusing to charge as required in charge No. 7, remarked, that such a charge was not one that the court could give in that form, inasmuch as it involved a question of fact, which the jury alone could determine from the evidence. And in the 4th charge the judge remarked, that in point of law the same was correct, but [*that he did not consider it applicable to the case.] *This interlineation apparent on the transcript. D. N. H., *Clerk.*

(Signed) THEO. H. McCALEB, [SEAL.]
*U. S. Judge.*

(No. 3.)

McMICKEN, vs. WEBB and others. } No. 135.

Be it remembered, that on the trial of this cause before a jury, the plaintiff offered in evidence a transcript of the record of the suit of Charles McMicken vs. James J. Weems, curator of the estate of James Ficklin, deceased, from the probate court, in and for the parish of West Feliciana, Louisiana, hereto annexed and made part of this bill of exceptions, (for said transcript see page 82,) for the following purposes, viz:

1st. To rebut the plea and evidence of the defendants, that said plaintiff had been guilty of such laches as would discharge the defendants from their liability on the note which is the object of the present suit.

2d. In order to prove that, previous to the institution of the present suit, due proceedings had been taken by the plaintiff, Charles McMicken, in order to secure a settlement of the partnership affairs formerly existing between the plaintiff and said Ficklin, referred to in the pleas of the defendants.

3d. That, subsequently to the institution of the present suit, the plaintiff, Charles McMicken, had brought the said cause, in the said probate court, to a final termination and judgment.

The defendants objected to the reception of said evidence to prove the 3d object above expressed, or to shew any proceedings subsequent to the date of the issue joined in this case by the filing of the answer on the 21st day of November, 1837.

The judge permitted the evidence to go to the jury, with the instruction that it must be confined to the two first objects mentioned in this bill of exceptions, to wit, to disprove the laches of the plaintiff, and to shew the proceedings of the plaintiff, for a liquidation of the partnership previous to and up to the time of issue joined; but that no evidence could be admitted of proceedings subsequent to that time, and that such proceedings were not to be regarded by the jury.

To which opinion and instruction of the judge, and instruction limiting the said evidence to what took place before the issue joined in this case, the plaintiff, by his counsel, excepted, on the ground that, as he offered said evidence not to change the issue in any manner, but to shew that the settlement of the partnership affairs of said McMicken & Ficklin, referred to in the pleas of defendants, had in point of fact taken place, though subsequent to issue joined, and that there is no law requiring evidence to exist to prove the issue at the time of said issue joined, provided it be otherwise unexceptionable; and said plaintiff tendered this his bill of exceptions, which is signed, sealed, and made part of the record in this case, which is done.

(Sig'd) THEO. H. McCALEB, [SEAL.]
*U. S. Judge.*

And on the 22d of March, 1845, the following petition for a writ of error was filed, to wit:

CHARLES McMICKEN, vs. AMOS WEBB & als. } No. 135.

To the honorable the judges in and for the fifth judicial circuit of the United States, holding sessions at New Orleans, in the eastern district of Louisiana:

The petition of Charles McMicken, the plaintiff herein, respectfully shews:

That a final judgment has been rendered against him in this case, on a verdict of a jury given; that he is dissatisfied with the said verdict and judgment, and is advised and believes that there are various errors in the proceedings in this case, to the prejudice and injury of your petitioner, and which can only be remedied by the Supreme Court of the United States, having appellate jurisdiction, and the proceedings of this honorable court in such cases as the present; that the amount in controversy in this case is more than the amount required by law to give jurisdiction in this case.

Your petitioner, therefore, prays that a writ of error may be allowed to him in this case, in order that he may have the errors aforesaid corrected, and justice done in the premises, and that the said writ be returnable into the Supreme Court at the next term thereof, and that the

defendants be duly cited to appear into said Supreme Court to answer the same, and that such further orders may be herein given as required by law, usage, or equity. And, as in duty bound, he will ever pray, &c.

(Signed) G. B. DUNCAN, *att'y for pet'r.*

*Judge's order.*

Be it so, on the plaintiff in error giving bond, in the sum of five hundred dollars, with C. M. Randall as surety, conditioned according to law, and that the said writ of error be returnable in the Supreme Court on the first Monday of December, 1845. This done and signed in open court.

(Sig'd) THEO. H. McCALEB,
*U. S. Judge.*

And on the same day, to wit, the 22d of March, 1845, the following bond for a writ of error was filed:

Know all men by these presents, that we, Charles McMicken, as principal, and Charles M. Randall, as suretv, are held, and firmly bound unto Amos Webb, Mrs. Mary Ann Smith, in her own capacity, and also as tutrix, and Ira Smith, in his own capacity, as tutor of the minors, Catharine and Sarah Smith, in the full and just sum of five hundred dollars, to be paid to the said Amos Webb, Mary Ann Smith, and Ira Smith, as aforesaid, their certain attorney, executors, administrators, or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents. Sealed with our seals, and dated this twenty-second day of March, in the year of our Lord one thousand eight hundred and forty-five.

Whereas, lately, at a circuit court of the United States, fifth judicial circuit, holding sessions in and for the eastern district of Louisiana, in a suit depending in said circuit court, wherein Charles McMicken is plaintiff, and Amos Webb et als., are defendants, judgment was rendered against the said Charles McMicken, plaintiff; and the said Charles McMicken having obtained a writ of error, and filed a copy thereof in the clerk's office of the said circuit court, to reverse the judgment in the aforesaid suit, and a citation directed to the said Amos Webb et als., citing and admonishing them to be and appear at a Supreme Court of the United States, to be holden at Washington the first Monday of December next.

Now, the condition of the above obligation is such, that if the said Charles McMicken shall prosecute his writ to effect, and answer all damages and costs if he fail to make his plea good, then the above obligation to be void; else to remain in full force and virtue.

(Sig'd) C. McMICKEN, [L. S.]
CHARLES M. RANDALL, [L. S.]

Acknowledged, sealed, and delivered, in the presence of—
Witness: (Sig'd) J. Q. A. HOIT, *dep. clerk.*

*Circuit court of the United States, district of Louisiana:*

I, Duncan N. Hennen, clerk of the circuit court of the United States, in and for the fifth circuit and district of Louisiana, do hereby certify, that the foregoing 268 pages contain a full, faithful, and true transcript of the record and proceedings, together with all the evidence adduced on the trial of Charles McMicken vs. A. Webb et als., No. 135, so far as the same now remain on file in said court.

In testimony whereof, I hereunto sign my name, and affix the seal of said court, at the city of New Orleans, this 30th day of [SEAL.] June, A. D. 1845, and 69th year of American independence.

DUNCAN N. HENNEN, *Clk.*

I, Theodore H. McCaleb, judge of the district court of the United States for the district of Louisiana, and one of the judges of the United States circuit court for the fifth circuit and district of Louisiana, do hereby certify, that Duncan N. Hennen, who signed the foregoing certificate, is clerk of the United States circuit court for the fifth circuit and district of Louisiana, and was at the time of so doing, and that full faith and credit are due to his acts as such, and that the foregoing certificate is in due form of law.

Witness my hand and seal this 30th day of June, A. D. 1845.

[L. S.] THEO. H. McCALEB, [SEAL.]

*The United States of America, to Amos Webb, Mary Ann Smith, in her own right, and as tutrix, &c., and Ira Smith, in his own capacity, and as tutor to the minors, Catharine and Sarah Smith, greeting:*

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at the city of Washington on the first Monday of December next, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States for the fifth circuit and eastern district of Louisiana, wherein Charles McMicken is plaintiff in error, and you are defendants in error; to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the honorable Roger B. Taney, chief justice of the Supreme Court of the United States, this twenty-second day of March, in the year of our Lord one thousand eight hundred and forty-five.

[L. S.] THEO. H. McCALEB, *U. S. Judge.*

Received March 24th, 1845, and on the 16th day of June, 1845, I served a copy of the within citation in error on Ira Smith, by handing the same to him in person, in the parish of West Feliciana, La., one hundred and sixty-nine miles from New Orleans.

WM. C. McDOUGAL, *D'y U. S. M'l.*

Fees, writ, $2
Mileage, 21 12.

*Marshal's return.*

Received March 24th, 1845, and on the 30th day of April, 1845, I served a copy of the within citation in error on Amos Webb, he being absent, by leaving the same at his domicil, (in the parish of St. Landry, La.,) in the hands of Charlotte Webb, a free white person, over the age of fourteen years, residing in the house, whose name was known to me, two hundred and twenty-four miles from New Orleans.

WM. H. BASSETT, *D'y marshal.*

Fees, writ, $2
Mileage, 22 40

$24 40

UNITED STATES OF AMERICA, *ss:*

The President of the United States, to the honorable the judges of the circuit court of the United States, in and for the fifth circuit, and holding sessions for the eastern district of Louisiana, greeting:

Because, in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said circuit court, before you, or some of you, between Charles McMicken and Amos Webb, Mrs. Mary Ann Smith, in her own right, and as tutrix, &c., and Ira Smith, in his own capacity, and as tutor to the minors, Catharine and Sarah Smith, a manifest error hath happened, to the great damage of the said Charles McMicken, as by his complaint appears.

We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ; so that you have the same at Washington on the first Monday of December next, in the said Supreme Court, to be then and there held; that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States, should be done.

Witness, the honorable Roger B. Taney, chief justice of the said Supreme Court of the United States, this twenty-second of March, in the year of our Lord one thousand eight hundred and forty-five.

For DUNCAN N. HENNEN,

[L. S.] *Clerk of the United States circuit court and Eastern district of Louisiana.*

J. Q. A. HOIT, *deputy clerk.*